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THE PRINCIPLES OF LEGAL
LIABILITY FOR TRESPASSES
AND INJURIES BY ANIMALS

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THE PRINCIPLES OF LEGAL LIABILITY FOR TRESPASSES AND INJURIES BY ANIMALS

BY

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PREFACE

THE law governing cases of wrongs committed by means of animals is difficult and obscure. This is due to the fact that cases upon the subject are not numerous and, as a rule, the topic is only dealt with incidentally in books on the Law of Torts. The consequent lack, both of authority and opinion, leads both to inconsistency and uncertainty.

This book aims at a systematic exposition of the principles underlying the law, by examining their origin and development and explaining their present application. It is hoped that it will prove of service to practitioners and also to those who are interested in theories of law.

The author desires to express his thanks to Professor Courtney Kenny who suggested to him the need for such a work and also to his friend Mr Roland Burrows, M.A., LL.D., of the Inner Temple, Barrister-at-Law, for much valuable advice during the preparation of this book.

SUNDERLAND.

January, 1915.

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A.C.	Law Reports, House of Lords and Privy Council Appeal Cases.	1891-
Ad. & El. }	Adolphus & Ellis.	1834-1841.
A. & E. }		
B. & Ald.	Barnewall & Alderson.	1817-1822.
B. & C.	Barnewall & Creswell.	1822-1830.
B. & S.	Best & Smith.	1861-1869.
Beav.	Beavan.	1836-1866.
Bing.	Bingham.	1822-1840.
Burr.	Burrow.	1756-1772.
C.B.	Common Bench.	1845-1856.
C.B. (N.S.).	Common Bench, New Series.	1856-1865.
C. & P.	Carrington & Payne.	1823-1841.
Camp.	Campbell.	1807-1818.
Car. & K. }	Carrington & Kirwan.	1843-1850.
Car. & Kir. }		
Co. Rep.	Coke.	1572-1616.
C.M. & R.	Crompton, Meeson & Roscoe.	1834-1836.
Cro. Eliz.	Croke, of the reign of Elizabeth.	
Cro. Jac.	„ „ „ James.	
Cro. Car.	„ „ „ Charles.	
Dowl.	Dowling.	1830-1842.
East.	East.	1801-1812.
Esp.	Espinasse.	1793-1806.
Exch.	Exchequer.	1847-1856.
Ex. D. }	Law Reports, Exchequer Division.	1875-1891.
Exch. Div. }		
F. & F.	Foster & Finlason.	1856-1867.

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Abbreviations	Reports	Dates
H. & N.	Hurlstone & Norman.	1856-1862.
H.L. Cas.	House of Lords Cases.	1846-1866.
Holt. (N.P.).	Holt's Nisi Prius.	1815-1817.
H. Bl. }	Henry Blackstone.	1788-1796.
Hy. Bl. }		
Ir. R.	Law Reports, Ireland.	(Current)
I.L.T.	Irish Law Times.	"
J.P.	Justice of the Peace.	"
Jon. W.	See W. Jo.	
Jur.	Jurist.	1837-1854.
[190-] K.B.	Law Reports, King's Bench Division	1901- .
Keb.	Keble.	1661-1679.
L.J. (C.P.)	Law Journal, Common Pleas.	} 1828- .
L.J. (Ex.)	" " Exchequer.	
L.J. (K.B.) or (Q.B.).	" " King's or Queen's Bench.	
L.J. (O.S.).	" " Old Series.	
L.R.C.P.	Law Reports, Common Pleas Cases.	} 1865-1875.
L.R. Exch.	" " Exchequer Cases.	
L.R.H.L.	" " English & Irish Appeals.	
L.R.Q.B.	" " Queen's Bench Cases.	
L.T.	Law Times Reports.	(Current)
Lat. }	Latch.	1625-1628.
Latch. }		
Ld Raym.	Lord Raymond.	1694-1732.
Lev.	Levinz.	1660-1696.
Lut. }	Lutwyche.	1682-1704.
Lutw. }		
M. & W.	Meeson & Welsby.	1836-1847.
Mod. }	Modern Reports.	1660-1732.
Mod. Rep. }		
Moo.	Moore.	1512-1631.
Moo. P.C.C.	Moore's Privy Council Cases.	1836-1862.
Moo. P.C.C. (N.S.).	Moore's Privy Council Cases. New Series.	1862-1873.
Moo. & P.	Moore & Payne.	1828-1831.

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Poph.	Popham.	1592-1627.
Q.B.	Queen's Bench.	1841-1852.
[189-] Q.B.	Law Reports, Queen's Bench Division.	1891- .
Q.B.D.	Law Reports, Queen's Bench Division.	1875-1890.
Salk.	Salkeld.	1689-1712.
Scott.	Scott.	1834-1840.
Scott (N.R.).	Scott's New Reports.	1840-1845.
Stark.	Starkie.	1815-1822.
St. Tr.	State Trials.	1163-1820.
Str. }	Strange.	1716-1749.
Stra. }		
T.L.R.	Times Law Reports.	1884- .
Taunt.	Taunton.	1807-1819.
Ventr.	Ventris.	1660-1691.
W. Jo.	Sir William Jones.	1620-1640.
W.R.	Weekly Reporter.	1882-1906.
Wils.	Wilson.	1742-1774.
Wm. Bl.	William Blackstone.	1746-1779.
Y. & J.	Younge & Jervis.	1826-1830.

INTRODUCTION

BEFORE entering upon an examination of the principles of legal liability for trespasses and injuries by animals it is necessary to classify animals themselves, for liability depends in all cases upon the kind of animal which is the cause of the wrong complained of.

English law, following the Civil law, distinguishes between “animals *ferae naturae*” and “animals *mansuetae* or *domitae naturae*,” the former class including all “wild animals” (in the popular sense) whether of a dangerous nature or otherwise, the latter class comprising all tame or domestic animals. The classification is primarily for the purpose of determining rights of property in animals, domestic animals alone being the subject of absolute ownership. But the classification is also at the root of liability for trespass by animals to land.

Our law recognises a further classification in determining the principles of liability for injuries by animals. According to this classification, animals may be either first, those which are of a naturally ferocious, dangerous or mischievous disposition; or secondly, those which are not of such a disposition. The latter the law assumes not to be dangerous, either because they are universally recognised as being of a harmless disposition or because they have acquired a harmless

disposition in this country by being domesticated for generations. Evidence will be received to show that a class of animals, hitherto accounted dangerous, has become domesticated and tamed in the course of time.

Considering first the question of trespass to land, it may be stated in general terms that no action will lie for the trespass to land of "animals *ferae naturae*." But, in connection with this, where such animals are brought or collected upon land in numbers greater than such land can reasonably and properly support, presumably an action will lie for the damage resulting from their escape. "Overstocking," as this has been called, is a nuisance, and to establish liability it must be proved that (1) the increase of animals is "artificial," not natural; (2) the defendant has gone beyond what is reasonable to enable him to have the natural and lawful use and enjoyment of his land; and (3) damage has occurred over and beyond that which ordinarily results from the trespass of such animals.

The person who tames or reclaims an animal which is usually found in a wild state in this country is liable for any trespass committed by it, and for the natural and ordinary consequences of such trespass. But this responsibility ceases when the animal has escaped and reverted to its wild state. Whether in any particular case it has so reverted is a question of fact.

The owner of domestic animals is under a duty to prevent them from trespassing on the lands of others. This duty is absolute, and therefore it is immaterial whether he has exercised proper care and caution in the matter. But his liability, on the other hand, extends only to the "natural and probable" conse-

quences of the trespass and not to consequences legally too remote.

The liability for trespass of animals is excluded where the trespass complained of is involuntary, or is due to vis major or the act of God; or is occasioned by the omission of a third person whose duty it was to keep a fence in repair and over whom the defendant had no control; or is the fault of the plaintiff who, being under a legal duty to fence out the defendant's cattle, omits to fence; or is committed from a highway where the animals are lawfully passing.

In considering the case of injuries to the person and other animals and of damage to goods, the principles of liability group themselves under three heads: the absolute duty of preventing harm, the duty of exercising care to prevent harm, and certain other duties conveniently considered in this connection, the chief of which are the positive duty of giving warning of the probable occurrence of harm, and the negative duty of refraining from the creation of anything in the nature of a concealed source of harm.

Dealing first with the absolute duty: a person who keeps an animal of a species well recognised to be ferocious, dangerous or mischievous, keeps it at his peril, and is liable for the consequences of any act of harm committed by it. Proof of negligence is unnecessary, as negligence is presumed by the law. The person who keeps such an animal is also taken to be cognisant of its dangerous nature, and proof that he had good reason to believe that the particular animal was docile and harmless will not affect his liability but may be tendered in reduction of damages.

Whether the mere keeping a dangerous animal is a wrongful act is a question to which the early authorities give a clear answer in the affirmative. More recently, doubts have been entertained by the courts as to the soundness of such authorities.

The person who keeps a domestic or harmless animal is not liable (apart from negligence or trespass) for harm caused by acts which the animal has a natural tendency to commit; nor is he liable at common law for acts of a vicious or mischievous nature, unless proof be given that he knew, at the time of the act complained of, that the animal possessed a propensity or disposition to commit acts of that character. Proof of such knowledge is technically called "proof of the scienter." Apart from Statute, liability does not depend upon ownership but upon possession. The person who "keeps" the animals is the responsible party.

In proving the scienter, knowledge must be shown of a propensity or disposition of the particular animal to commit acts of the kind which has effected the injury or caused the damage complained of. Evidence of scienter, generally speaking, must tend to establish knowledge of that particular propensity, not of some disposition equally obnoxious.

By the Dogs Act 1906 (repealing and re-enacting with some modifications the Dogs Act 1865) the owner of a dog is rendered liable for injuries done by it to cattle, including horses, mules, asses, sheep, goats and swine; and the complainant is exempted from proving scienter or negligence on the part of such owner. Further, where any such injury has been done, the

occupier of premises where the dog was kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog and is liable for the injury unless he proves that he was not the owner of the dog at that time. In case there are several occupiers, as where the premises are let in separate apartments or lodgings or otherwise, the occupier of that part of the premises in which the dog has been kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog. If the damages claimed do not exceed £5, proceedings for recovery of the same may be taken under the Summary Jurisdiction Acts as for a civil debt.

Scienter may be established by proof of knowledge on the part of a servant or agent, if the person who keeps the animal has delegated to his servant or agent either the management of his business (so as to make it the duty of the servant to communicate his knowledge to his master), or the control of the animal which caused the injury.

Assuming that the other conditions of liability are present, it is immaterial whether the harm complained of is an injury to the person or damage to property (including other animals), or whether it occurs on the premises where the animal is kept, or on the premises of the plaintiff or any other person, or on the highway.

The absolute liability is excluded where the injury is caused by vis major or the act of God (*sed quaere*); where the immediate cause of the injury complained of was the act of a third person; where the plaintiff suffers by his own default or brings the injury upon himself, or where he, knowing of the risk of harm,

voluntarily undertakes it; or where the plaintiff, at the time of the injury complained of, was trespassing upon the premises where the animal was kept.

The person who has kept a dangerous animal presumably remains responsible after it has escaped for all acts of harm committed by it, if it is one of a class not usually found at large in this country. If it is of a class which usually is found at liberty, then, it is submitted, the responsibility for its future acts ceases as soon as the animal has returned to its natural state *sine animo revertendi*.

With reference to negligence, a person who keeps an animal is liable for harm caused by it, or through its instrumentality, in any circumstances in which the law raises a duty of taking care in the control of the animal on the part of that person, and there has been a breach of that duty. Liability extends to the natural and probable consequences of the breach of duty, but not to an unexpected event.

The circumstances in which such a duty arises cannot be classified, but the commonest case is where an animal is on the highroad accompanied by a person under whose control it purports to be. Here care must be exercised to prevent harm to others occurring through the animal entering on private property or coming in contact with passengers on the highway.

There is no duty at common law on the part of an occupier of land adjoining a highway to fence his land so as to prevent his animals from straying on the highway. Such an occupier is therefore not liable for negligence if an animal of his, not known to him to be dangerous, strays on the highway and there causes

damage. But where animals are allowed to stray on a highway in such numbers or under such circumstances as to cause an obstruction and to make the highway unsafe and dangerous to the persons using it, an action will lie.

Where premises are rendered unsafe by reason of the fact that the occupier keeps an animal there which is of a dangerous disposition, the occupier is under a duty to take reasonable care to prevent harm which he knows or ought to know is likely to occur to persons who enter upon the premises at his invitation, express or implied. But where persons enter upon such premises by the mere permission of the occupier, the duty of the latter is no more than to give warning of the dangerous character of the animal.

A person who lets out for hire an animal which he knows or ought to know is dangerous is under a duty to warn, not only the person who hires it, but also any person who he knows or contemplates or ought to contemplate will use it, and such duty is independent of contract.

PART I

THE CLASSIFICATION OF ANIMALS

1. (1) English law distinguishes between animals *ferae naturae* and animals *mansuetae* or *domitae naturae*. The former class includes all wild animals, whether of a dangerous nature or otherwise. The latter class comprises all tame or domestic animals.

(2) The purpose of the classification is primarily for the determination of rights of property in animals.

(3) The same classification is the ground of liability for the trespass of animals.

(1) The English law has adopted the same classification of animals as that which obtained in the Civil law. Animals *ferae naturae* include all wild animals, whether they are of a ferocious or mischievous nature or not. Thus lions, tigers, bears (*Besozzi v. Harris* [1858], 1 F. & F. 92), wolves, elephants (*Filburn v. The People's Palace and Aquarium Company Ltd* [1890], 25 Q.B.D. 261), monkeys (*May v. Burdett* [1846], 9 Q.B. 101), rabbits, deer (*Brady v. Warren* [1900] 2 I.R. 632) and pigeons, are to be reckoned as

animals *ferae naturae*. Animals *mansuetae* or *domitae naturae* comprise all tame and domestic animals such as cats (*Clinton v. J. Lyons & Co.* [1912], 3 K.B. 198), dogs (*Read v. Edwards* [1864], 17 C.B. (N.S.) 245), horses (*Cox v. Burbidge* [1863], 13 C.B. (N.S.) 430), cattle and others of a like nature.

The distinction between the two classes has no reference to the proclivities of the animal itself; for on the one hand many animals *ferae naturae* (e.g. rabbits) are universally recognised to be of a harmless disposition, and on the other hand many animals undoubtedly *domitae naturae* are addicted to acts of a nature harmful to property.

The law is also said to distinguish between animals *ferae naturae* "fit for the food of man" and those which are not. (*Hannam v. Mockett* [1824], 2 B. & C. 934.) But here the true distinction seems to be between those animals which under normal circumstances enjoy a state of natural liberty and those which are usually found living in association with man.

Some writers assume that all animals were originally wild and continued so until brought into a state of subjection by man. Thus Blackstone remarks: "Under this head (animals *ferae naturae*) some writers have ranked all the former species of animals we have mentioned (animals *mansuetae* or *domitae naturae*) apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle; which if originally left to themselves would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity; and are therefore, say they, called man-

suetae quasi manui assueta. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae*: and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in tanks." (Comm. Bk 11, c. 35.)

Tamed animals are separately classed by Bracton as "*animalia mansueta*," and for some purposes this treatment might well be retained. It seems that domestic animals which gain their freedom and eventually become wild are classed as animals *ferae naturae*. (Falkland Islands Co. v. Reg. [1863] 2 Moo. P.C.C. (N.S.) 266.)

(2) Domestic animals are the subject of absolute property. They are in the same category as chattels. The right of ownership is retained in them even though they are lost, and an action of trover will lie for their recovery. (*Binstead v. Buck* [1777], 2 Wm Bl. 1117.) An action of trespass may also be maintained for taking them or carrying them away. "An action of trover doth lie where a trespass doth not and if the plaintiff hath mistaken his action, that shall be no bar to him. ....If a man bring trespass for the taking of a horse

and is barred in that action, yet if he can get the horse in his possession, the defendant in the trespass can have no remedy, because, notwithstanding such recovery, the property is still in the plaintiff." But a recovery in trespass is a good plea in bar to an action of trover for the same taking. (*Putt v. Roster* [1682], 2 Mod. Rep. 319.)

Animals *ferae naturae*, while living, are not the subject of absolute ownership. They are not reckoned as a man's goods and chattels but pass with his freehold. They may be his "*ratione soli*" or "*ratione privilegii*" by reason of a park or warren. Moreover, a "qualified" property is said to be acquired in animals *ferae naturae* by taking or taming them (*Sutton v. Moody* [1697], 1 Ld. Raym. 250), and a "possessory property" subsists in the young of animals *ferae naturae* whilst they are on a person's land and have not yet acquired the capacity of flight.

Case of Swans ([1591] 7 Co. Rep. 15). "In this case it was resolved, that in some of them which are *ferae naturae*, a man hath *jus proprietatis*, a right of property; and in some of them a man hath *jus privilegii*, a right of privilege. And there are three manner of rights of property: scil. property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *ferae naturae*, but in those which are *domitae naturae*. Property qualified and possessory a man may have in those which are *ferae naturae*; and to such property a man may attain by two ways: by industry, or *ratione impotentiae et loci*; by industry as by taking them, or by making them *mansueta*, i.e. *manui assueta*, or

domesticae, i.e. domui assueta; but in those which are ferae naturae, and by industry are made tame, a man hath but a qualified property in them, scil. so long as they remain tame, for if they do attain to their natural liberty, and have not *animus revertendi*, the property is lost; *ratione impotentiae et loci*, as if a man has young shovelers or goshawks, or the like, which are ferae naturae, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass. . . . But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, etc., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore in an action, *quare parcum warrennum etc. fregit et intrav', et 3 damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *suos* for he hath no property in them, but they do belong to him *ratione privili'* for his game and pleasure, so long as they remain in the privileged place."

With regard to *jura proprietatis* in animals ferae naturae such as are termed game, the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession. (*Blades v. Higgs* [1865], 11 H.L.Cas. 621.)

At common law there could be no larceny of dogs, by reason of the "baseness of their nature"; nor of such tamed or reclaimed animals as "serve not for food but pleasure," such as bears, foxes, or ferrets; but an action of trespass can be maintained in respect of them. (1 Hale P.C. 512.) It seems also that an action

of trover will lie for any reclaimed animal. (Com. Dig. Action sur Trover, C.)

(3) The trespass of animals was, under the old practice, remediable in an action of trespass and not by means of an action on the case. The writ of trespass, moreover, was available only in the case of those animals in which a right of property could exist at common law. Hence the practical result was that to ascertain whether a remedy could be had it was necessary first to classify the animal.

2. (1) English law recognises a further classification in determining the principles of liability for injuries by animals. Here, animals may be classed in two divisions according to their propensities or disposition, namely: first, those animals which are of a naturally ferocious, dangerous or mischievous, though possibly reclaimable disposition; and secondly, those animals which are of a harmless disposition.

(2) The classification does not depend on rights of property in animals. This being so, it is better to adopt the terms "dangerous animals" and "harmless animals," or kindred general expressions, to denote the respective classes in preference to the terms "animals *ferae naturae*" and "animals *domitae* or *mansuetae naturae*" which are commonly employed for that purpose.

(3) “Harmless animals,” in the sense used in the previous paragraph, includes all animals which are universally recognised as being not originally by nature dangerous, and all animals which in this country have acquired a harmless disposition by being domesticated for generations.

(4) The courts will take judicial notice of the fact that certain animals belong to the class of dangerous animals or to the class of harmless animals. Evidence will be received to show that a species of animals hitherto accounted as of the dangerous class, has, by the habits or training of generations, become tame and domesticated, and therefore ranks with the harmless class of animals.

In treating of injuries by animals the principles of liability are found to rest upon a distinction between those animals which are and those which are not of a dangerous nature. The name “*animals ferae naturae*” is habitually applied to the former class, though it and the corresponding English term “wild animals” are ambiguous and misleading.

The basis of the classification and the rules of law thereon founded are well put by Lord Esher M.R. in his judgment delivered in *Filburn v. The People's Palace and Aquarium Co. Ltd* ([1890], 59 L.J. (Q.B.) 471), a case of injury by an elephant. “There is no doubt that the law of England recognises two distinct

classes of animals. With regard to one class, a person who keeps an animal of that class must keep it at his peril, and prevent it from doing injury; and whether he knows it to be dangerous or not is immaterial. There is another class of animals which the law assumes not to be of a dangerous nature, although individuals of that class may become dangerous, and a person who keeps an animal of that class is not liable for injury done by it unless he knew that the individual animal was dangerous. What is the best formula for determining to which particular class a particular animal belongs? There are some animals which it is well known are not originally by nature dangerous, and which the law recognises as not being dangerous, and it is immaterial whether they have become domesticated or not. Whether they are *ferae naturae*, as not being the subject of property, is not the point. Thus, rabbits, hares, pheasants, partridges, and the like, are *ferae naturae* in the sense that they do not belong to anyone until they have been reduced into possession, but they are not *ferae naturae* in the sense that they are dangerous. There is another set of animals which the law has recognised as not being of a dangerous nature in England; these are cows, oxen, horses, dogs, sheep, and many others, which I need not attempt to enumerate. How has that recognition come about? Some of these animals originally, whether in this country or elsewhere, in their wild state were dangerous, but a great many years ago the whole race of animals of that kind in this country was so tamed that it is known as a matter of fact that their progeny are not dangerous, and they are recognised not to be dangerous.

The animals I have mentioned are recognised by the law of England as not being of a dangerous nature because of such universal knowledge, and the law assumes without further proof that such animals are not of a dangerous nature.... Unless, therefore, an animal can be brought within one or other of those recognised classes—namely, animals which are nowhere dangerous, or animals which have come to be recognised in England as not being of a dangerous nature—it must be treated as an animal belonging to the class of animals which must be kept from doing mischief, and such animal would come within the first and not the second class.” The Court held that, as an elephant could not be said to be not dangerous by nature nor domesticated in this country, it must be reckoned as a dangerous animal.

Whether a particular animal belongs to one or the other class seems to be a question of law. The Court will take judicial notice of the fact that certain animals belong to the class of dangerous animals in this country; such as lions and tigers (*Rex v. Huggins* [1730], 2 Ld Raym. 1583), bears (*Besozzi v. Harris* [1858], 1 F. & F. 92), wolves, elephants and monkeys (*May v. Burdett* [1846], 9 Q.B. 101). Bees apparently are not animals *ferae naturae* in this sense. (*O’Gorman v. O’Gorman* [1903] 2 Ir. Rep. 573.)

From the few cases which have occurred of injuries following the keeping of dangerous animals it seems that the courts will refrain from enumerating such animals generally, but will be content to decide the question in each new case as it arises; and from the remarks of Lindley L.J. in *Filburn’s* case it appears

that evidence would be accepted to show that a species of animals, hitherto accounted as of the dangerous class, has become so tamed and domesticated that it is known as a matter of fact that their progeny are not dangerous, and that they are recognised not to be dangerous. In this event the species would fall within the rules governing the class of harmless animals.

PART II

TRESPASS TO LAND

SECTION I. *By animals ferae naturae*

1. No action will lie for the trespass of animals *ferae naturae*.

For damage caused by rabbits or hares or other like animals which escape from my land into yours, I am not responsible; for you may capture or kill them at your pleasure.

Mich. 39 and 40 Eliz. In the Common Pleas. "Between Boulston and Hardy it was adjudged in the Common Pleas, that if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coney-boroughs come on his neighbour's land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coney-boroughs do in which he has no property, and which the other may lawfully kill" ([1597], 5 Co. Rep. 104 b). A more detailed report of this case may be found in Cro. Eliz. 547.

ERRATUM

p. 19, line 28, *for gave read* gone.

To the same effect is *Hinsley v. Wilkinson* (Cro. Car. 387), where it was held that a commoner could not maintain an action for damage done by the rabbits of another upon the common.

Boulston's case is cited with approval by Bayley J. in delivering the judgment of the full Court of King's Bench in *Hannam v. Mockett* ([1824], 2 B. & C. 939), and must now be regarded as settled law on this point. See *Brady v. Warren* ([1900] 2 Ir. Rep. 632).

It is noticeable that in the principal case the injury was brought about by defendant's own active interference. He it was who made the "boroughs" and stocked the conies. The principle of the case is clear enough, but the facts are wide enough to cover the exception contained in the next following rule and it is a difficult matter to reconcile the two.

2. But where such animals are brought on land in numbers greater than such land can reasonably and properly support, it seems that an action will lie for the damage resulting from their escape. The ground of action (if such an action does lie) is nuisance, and to establish liability it is essential that:

(a) the increase in numbers of the animals be caused by the act of the defendant. For damage resulting from a natural increase no action will lie.

(b) defendant shall have gone beyond what is reasonable to enable him to have the

natural and lawful use and enjoyment of his land.

(c) proof be given of damage over and beyond that which ordinarily results from the trespass of such animals.

If there be wild animals in my close, whether there naturally or brought there by me, I am not responsible for their trespass to the land of another. But if I cause game to be brought on my land or if I artificially accumulate them so that their numbers become greater than my close may reasonably support, and by reason of this "non-natural" increase, so to speak, the animals are crowded out and escape into your lands and cause damage there, this, it seems, is a nuisance for which I am answerable.

In *Farrer v. Nelson* ([1885], 15 Q.B.D. 258) where land was let to a tenant reserving the right of shooting over it, it was held that the tenant was able to maintain an action against the persons entitled to the shooting rights for overstocking the land with game so as to cause damage to the tenant's crops. In that case Baron Pollock said: "I will first deal with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule '*sic utere tuo ut alienum non laedas*.' I agree, however, that this does not solve the question before us....As I understand the law each person in this

country is entitled to bring on his land any quantity of game which can reasonably and properly be kept on it, and so that nothing extraordinary and non-natural is done....So here, so long as the lessee of the right of shooting was exercising the ordinary rights which the landlord who had reserved the right might have exercised, he was acting within his rights, but the moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage which he has sustained."

It is to be noticed that the remarks of Pollock B. as far as the occupier of the land is concerned and apart from contract, are obiter dicta merely.

Apparently there has been no actual decision on the main question. As in *Farrer v. Nelson* so in *Hilton v. Green* ([1862], 2 F. & F. 821), *Birkbeck v. Paget* ([1862], 31 Beav. 403) and *Paget v. Birkbeck* ([1863], 3 F. & F. 683) the question was the liability to the occupier of the land of a person entitled to the right of shooting over that occupier's land, not his liability to an adjoining owner.

In such cases the question to be determined is whether the act of bringing the animals on the land is authorised by the right granted to the defendant. The question of the rights of adjoining owners or occupiers is quite a different matter and does not depend on grant. The maxim "*sic utere*" etc. does not contribute much towards a solution of the question. As *Erle J.* points out (El. Bl. & El. 643) "The maxim is mere verbiage; a party may damage property

of another where the law permits, and he may not where the law prohibits, so that the maxim cannot be applied till the law is ascertained, and when it is the maxim is superfluous." It is also a question of much difficulty as to what is comprised in the term "animal" in the passage quoted from the judgment of Pollock B.

The matter was again considered in *Brady v. Warren* ([1900] 2 Ir. Rep. 632), and discussed in great detail, but there was no necessity for a decision on the point. However, it was there said: "In order to maintain the present action it is not sufficient for the plaintiff to show that he has sustained damage by wild rabbits which came from defendant's demesne; he must also show that such damage was caused by defendant's going beyond what was reasonably necessary in order to enable him to have the natural and reasonable use and enjoyment of his own land which is his lawful right. If the plaintiff only shows that his land is damaged by defendant using his land in the natural manner he cannot succeed. At the present time it is not unlawful or unnatural or unreasonable use of land for the owner to have on it ground or feathered game or rabbits all wild by nature, to such a moderate extent as the land is so circumstanced as to be reasonably capable of supporting; and if pursuing their natural instincts the ground game or rabbits stray or winged game fly to neighbouring land, the neighbour, though he sustain damage by such game or rabbits, has not I think a right of action against the owner of the land from which such game or rabbits stray or fly; because, being wild by nature he has no property in them, and the neighbour may himself acquire the

property in them by reducing them into possession on his land, and then it is his game or rabbits....It may be that the case would be different if the damage of which the plaintiff complains was caused by the defendant actively doing anything going beyond what is reasonable to enable him to have the natural use and enjoyment of his own land such as bringing or collecting or preserving (which is equivalent to collecting) game wild by nature *ferae naturae*, ground or feathered, on his land to an immoderate extent beyond what the land is reasonably capable of supporting—overburdening, or, as it is commonly expressed, overstocking his land with game which must in that case, in the nature of things, seek for sustenance or shelter elsewhere” (Johnson J.). At the trial of the action the jury had been directed that they must be satisfied that there was a use of the rabbits by the defendant as his property which would impose a duty of reasonable care not to injure his neighbour in the mode of using his own property. On appeal, Johnson J. does not seem to have taken a different view as to the ground of liability, but he held in the particular case that the rabbits were not the rabbits of the defendant, nor his property, nor kept by him; but were wild rabbits, animals *ferae naturae*, for whose acts defendant was not responsible.

The fact that such a nuisance exists does not justify a trespass by an adjoining landowner in order to abate it. Moreover, a claim by a commoner to fill up burrows and to destroy rabbits which are kept in such numbers as to be a surcharge of the common cannot be upheld. The proper remedy in such a case

is by action at law. "A coney burrow is not, of its own nature, a nuisance: on the contrary, it is essential to a free warren. Therefore the nuisance depends upon the number of them, and you can, at the utmost, only abate so much of the thing as is a nuisance. You cannot destroy the whole (which is the right here claimed) but only so much of the thing as makes it a nuisance." (*Cooper v. Marshall* [1757], 1 Burr. 259.)

SECTION II. *By reclaimed animals*

1. The person who tames or reclaims an animal which is usually found in a wild state in this country is liable for any trespass committed by it and for the natural and ordinary consequences of such trespass.

The person who takes and tames or reclaims an animal *ferae naturae* acquires a qualified property in the animal. At the same time and by reason of his right of property he accepts responsibility if it escapes and trespasses on the land of another. The rule with regard to animals *ferae naturae* which have been reduced into possession and tamed or reclaimed is the same, therefore, as that obtaining in the case of domestic animals, namely, that their owner is liable, when they escape and trespass, for any damage caused by them, provided that such damage is the natural and ordinary consequence of such trespass.

Therefore where tame pigeons or doves destroy another's crops, an action will lie for the damage caused

by them. (*Dewell v. Saunders* [1618], Cro. Jac. 490.) Here it was held (disapproving of a resolution to the contrary in *Boulston v. Hardy*) that the erecting of a new pigeon-house by the freeholder of a manor is not a common nuisance inquirable at the leet. "But Montague said if those who have not any lands at all should erect dove-houses, and increase multitude of pigeons, to the grievance of the country, it may be enquired of before the justices of Assize." The reporter also adds the following: "Note that in the argument of this case Justice Doderidge said that if pigeons come upon my land I may kill them, and the owner hath not any remedy; but the owner of the land is to take heed that he take them not by any mean prohibited by the statutes: to which opinion Croke and Houghton accorded. But Montague held the contrary and that the party hath *jus proprietatis* in them, for they are as domestics and have *animum revertendi* and ought not to be killed; and for the killing of them an action lies: but the other opinion is the best."

Deer, though animals *ferae naturae*, may be reclaimed and belong to the person who has tamed them so as to make him responsible for trespass by them and the ordinary consequences of such trespass. In the case of *Brady v. Warren* ([1900] 2 Ir. Rep. 632) deer had been confined in a walled deer-park on defendant's estate. Several years prior to defendant's coming into possession of the estate, a portion of the surrounding wall had been blown down and a number of deer had escaped. The wall was repaired, and although further dilapidations occurred from time to

time, apparently no other deer got out. The deer which had escaped wandered about the estate and began to trespass on plaintiff's farm which adjoined the estate, causing great damage to his crops. After defendant came into possession, the trespasses became more frequent, but the animals always returned to the estate. Defendant organised parties to shoot the deer which roamed the estate, gave permission to the plaintiff to shoot the deer, and announced generally that anyone who could shoot them might do so. He, however, kept a woodranger to look after the deer, and this man had seen deer wandering some distance from the estate but was unable to say whether they returned. Moreover, defendant's predecessor had been used to feed the animals in winter with hay, laurel and oats, but defendant had not continued the practice. On these facts it was held by a majority of the Court that there was evidence to support the finding of the jury that the deer were defendant's deer, that they were tame and domesticated, and were "kept" by defendant and under his control; and that the defendant was liable for any damage done by the deer to plaintiff's land and crops.

Bees are reclaimed and become the subject of property when they are hived, but it is questionable whether the person who hives them becomes responsible in law if in the ordinary course of their activities they fly to adjoining lands and there sting cattle or human beings. Such would not seem to be a natural and probable consequence of their escape. (*O'Gorman v. O'Gorman* [1903] 2 Ir. Rep. 573.)

It is unnecessary to give further illustrations of

this part of the subject here, as the rules are worked out in greater detail when dealing with the trespass of domestic animals.

2. The responsibility for the trespass of tamed or reclaimed animals ceases when they have reverted to their wild state. Whether such animals have so reverted is a question of fact in each case.

“If one kept a tame fox which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him and he hath remained in his wild nature.” (Opinion of Marsden J. Anon. 1 Ventr. 295.)

Though this opinion is doubted by Johnson J. in *Brady v. Warren* (ante p. 25) and, it may be, with reason in the case of injuries by a fox (if such a case be conceivable), yet logically, and if confined to the case of trespasses by harmless animals, it would seem to be correct in principle. If it be law that a man is not responsible for the trespass of animals *ferae naturae*, the position follows immediately. For a reclaimed animal is nevertheless an animal *ferae naturae* although it has lost its wild habits for a time (see *Besozzi v. Harris* [1858], 1 F. & F. 92). If it regains its wild nature, upon what principle can responsibility for its trespass be attributed to the person who formerly kept it?

Our law follows the Civil law thus far. A divergence between the two is to be noted hereafter in the case of injury caused by a wild animal which has by

nature dangerous or mischievous proclivities. And it is probably this case which Johnson J. had in mind when he expressed doubts as to the correctness of the opinion of Marsden J.

For a fuller illustration of the rule reference must be made to the case of *Brady v. Warren* (ante p. 25), where it was admitted by defendant that he would be answerable for damage done by escaped deer if they were still to be reckoned as tamed or reclaimed and had not in fact reverted to their wild state.

SECTION III. *By animals domitae naturae*

1. The owner of domestic animals is bound at his peril to keep his animals from straying on the lands of others. Whether the escape of the animals is due to negligence is immaterial in determining liability.

With regard to domestic animals the law is clear enough. Their owner is bound at his peril to prevent his animals from straying. "Ils ont fait tort quand les bestes vont oustre la terre." (Y.B. 7 Hen. VII, Mchas. fo. 16, pl. 1.)¹

The duty is absolute and not one of taking care.

From the early authorities it would seem to be doubtful whether the liability of the owner is trespass or negligence. For instance, Sir William Blackstone in his *Commentaries*, III. Ch. 12, says that "a man is

¹ Quoted in Prof. Courtney Kenny's *Select Cases on the Law of Torts*, p. 597.

answerable for not only his own *trespass*, but that of his cattle also; for, if by his *negligent keeping* they stray upon the land of another (and much more if he permits, or drives them on) and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages."

At an early date the ground of liability seems to have been further confused by the cases where the harm is suffered through the omission to keep or maintain a fence in repair. Cases of this nature are almost always concerned with the escape and trespass of animals, although the principles governing the two matters are quite distinct.

The owners of adjoining closes are, at common law, not bound to fence either against or for the benefit of each other. (*Star v. Rookesby* [1711], 1 Salk. 335, *Churchill v. Evans* [1809], 1 Taunt. 529, *Hilton v. Ankesson* [1872], 27 L.T. 519.) But an owner of land may be bound by statute, agreement or prescription to fence his land for the benefit of an adjoining occupier. Prescription is by far the most usual source of the obligation, which has been said to be "in the nature of a spurious easement" affecting the land of the person who is bound to maintain the fence.

Although the nature of the prescriptive obligation in early law was not certain, in modern law the maintenance of the fence, where it is enjoined, is an absolute duty which may be violated by simple omission on the part of the person upon whom that duty is cast, whether plaintiff or defendant. It follows that the omission to repair the fence may be urged as matter of

defence, or it may be adopted as the foundation of liability. And it occurs in connection with (a) damage caused by trespassing animals, or (b) harm caused to animals whilst straying. Thus in an old case reported in 1 Vent. 264 the action was in case "in defectu fensurarum" for the loss of a mare which had been drowned in a ditch on defendants' land, having escaped there through a gap in a hedge which defendants were prescriptively bound to maintain.

The two grounds of liability and the reasons for them are stated in the case of *Star v. Rookesby* ([1711], 1 Salk. 335). "Error was brought on a judgment by default in C.B. in an action on the case, wherein the plaintiff declared that he was possessed of a close adjoining to the defendant's, and that the tenants and occupiers of that close had time out of mind made and repaired the fence between the plaintiff's and defendant's close, and that for want of repair the defendant's cattle came into the plaintiff's close, etc. Et per cur.: First, Either trespass or case lies; trespass, because it was the plaintiff's ground and not the defendant's; and case, because the first wrong was a nonfeasance and neglect to repair, and that omission is the gist of the action; and the trespass is only consequential damage."

By the writ "*de curia claudenda*" the person entitled by prescription to the benefit of the fence could compel the adjoining owner to keep the fence in repair and, at the same time, recover damages for the consequences of its non-repair.

A modern instance of the nature of the obligation is given in the case of *Lawrence v. Jenkins* ([1873],

L.R. 8 Q.B. 274). Defendant, who was the occupier of a close adjoining another close occupied by plaintiff, sold the timber on his close to a third person who cut down a tree in such a negligent manner as to break a gap in the hedge dividing the two closes. Two cows belonging to plaintiff got through this gap and ate some yew leaves in defendant's close, with the result that the animals were poisoned and died. The evidence showed that defendant and his predecessors had for more than forty years repaired the fence which was on his land, and that for the last nineteen years the fence had been repaired by defendant and his predecessors upon notice by the occupier for the time being of plaintiff's close. Whenever repairs were executed they were for the purpose of preventing cattle on plaintiff's close from escaping into defendant's close. The Court came to the conclusion upon the evidence that the defendant was bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence; and that except in the case of damage by the act of God, or vis major, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause.

The fact that plaintiff was a gratuitous bailee of the animal makes no difference. (*Rooth v. Wilson* [1817], 1 B. & Ald. 59.) The defendant is liable for all the natural consequences of his omission to repair the fence, but not for damage caused by vis major or the act of God. (*Powell v. Salisbury* [1828], 2 Y. & J. 391.) Apart from statute, agreement or prescription it is now well settled law that there is no duty to erect or

maintain a fence between two adjoining closes, but that even in the absence of such a duty the owner of animals is bound to prevent them straying. "There can be no doubt that the general rule of law is that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the lands of others." (Bayley J. in *Boyle v. Tamlyn* [1827], 6 B. & C. 337.) "At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises." (Archibald J. in *Lawrence v. Jenkins*, *supra*.) See also *Churchill v. Evans* ([1809], 1 Taunt. 529) and *Tenant v. Goldwin* ([1704], 6 Mod. 314). The same views are expressed by Coleridge L.C.J. in the case of *Ellis v. Loftus Iron Co.* ([1874], L.R. 10 C.P. 10), and by Stephen J. in *Tillett v. Ward* ([1882], 10 Q.B.D. 19), both of which cases there will be occasion to mention in detail in another connection.

Similarly there is no general rule of law imposing the obligation on the owner or occupier of lands abutting on a public road to keep up the fences separating the close from the road. (*Potter v. Parry* [1859], 7 W.R. 182; *Binks v. South Yorkshire Railway and River Dun Company* [1862], 3 B. & S. 244.) This has an important bearing on the law dealing with the straying of animals from private property upon a public highway where they do acts of harm. This matter will be dealt with later.

What is said to be the modern view as to the liability is stated by Mr Justice Brett (in L.R.

2 C.P. 10) as follows: "Having looked into the authorities it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass¹." If this view is the correct one, it at least must not be taken in any way to be inconsistent with the next rule as to remoteness of damage, the principle of which is well-settled law.

The law seems to take a laxer view of the responsibility for trespass in the case of dogs than in the case of other domestic animals. In an old case, *Millen v. Fawdrey* ([1625], as reported in *Latch.* 119), *Littleton J.* said: "Et est un difference inter un chein & auters avers; si un chein vaer en vostre terre naveres action." And the reason he gives is that "ley ne presumer, que home avera tiel command sur son chein a recaller luy al instant."

In a later and better known case of *Mason v. Keeling* ([1700], 1 *Ld Raym.* 606), *Holt C.J.* said: "...there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality... And the law does not oblige the owner to keep the dog in his house; for if the dog break a neighbour's close, the owner will not

¹ Quoted in *Pollock's Law of Torts*, 6th Edn, 479.

be subject to an action for it. But if a servant leaves open the stable door, and a coach-horse runs out and does mischief, it is otherwise."

The true meaning of Lord Holt's words has been the subject of much conjecture. In *Cox v. Burbidge* ([1863], 13 C.B. (N.S.) 430) Willes J. gives what he thinks is the origin for the distinction drawn between dogs and other domestic animals, and is of opinion that "control" is meant by Lord Holt instead of "property." "I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are restrained, and a dog which is not usually kept confined; and there may be good reason besides '*de minimis non curat lex*' why an action should not lie against a man whose dog without the will of its master enters another's land, though it is different in the case of a horse or an ox. Perhaps control was meant by Lord Holt and not property. His dictum exhausts itself on the liability of the owners of horses and oxen for trespasses committed by them on land, pursuing their ordinary instincts in search of food."

In the case of *Brown v. Giles* ([1823], 1 C. & P. 118), Park J. thought that the case of a dog jumping into a field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all on which an action could be maintained.

The reasons which have been offered for a distinction in this respect between dogs on the one hand and oxen on the other were stated in *Read v. Edwards* ([1864], 17 C.B. (N.S.) 245) to be first, the difficulty or

impossibility of keeping the former under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered at common law so absolutely the chattels of their owner, as to be the subject of larceny. The question whether such a distinction did exist was not actually decided in that case because the action was not for a mere trespass but for chasing and destroying game, and it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, was to the knowledge of its owner accustomed to chase and destroy game, and, notwithstanding this, was allowed to roam at large in the vicinity of plaintiff's wood in which there was game.

In *Sanders v. Teape and Swan* ([1884], 51 L.T. 263), a dog, which was being taken out by one of the defendants, in running about in playfulness, jumped over a low wall and fell on the plaintiff who was working in a stooping posture in a hole on the other side of the wall. In an action for damages for the injuries sustained it was held that, inasmuch as the dog was not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action either as for a trespass or as for any breach of duty. "If a man keeps horses and other animals, he is bound to keep them on his own ground; if he does not he may be liable to an action of trespass. There is an exception to this when they are on a public highway, as they have a right to be there, and then the owner is bound to use ordinary care. But in the case of dogs, pigeons and the like,

the case is different; if a dog, not being exceptionally mischievous, acting in playfulness goes over another man's land, there is no trespass, and the owner of the dog would not be liable. Here, so far as the defendants are concerned, the occurrence was purely accidental and involuntary" (Williams J.). The last words seem to give the key to the whole question. Such trespasses on the part of animals which are usually allowed full liberty are involuntary trespasses and fall under the general exceptions from liability in tort which are usually classed under the heading of inevitable accident.

2. Although the duty is absolute to prevent animals from straying upon the property of others, yet the liability resulting from a breach of that duty extends only to the natural and probable consequences of the wrong and not to remote consequences.

This qualification of the general rule is not in any way exceptional, but merely an instance of the application of the general principles of liability in tort. "When complaint is made that one person has caused harm to another, the first question is whether his act (or default) was really the 'cause' of that harm in a sense upon which the law can take action. The harm or loss may be traceable to his act, but the connection may be, in the accustomed phrase, too remote.... The distinction of proximate from remote consequences is needful, first to ascertain whether there is any liability at all, and then, if it is established that wrong has been

committed, to settle the footing on which compensation for the wrong is to be awarded¹." In the majority of cases of liability for tort, and especially in cases of negligence, the two functions are inseparable. The very process which determines the question of liability at the same time ascertains the consequences of the wrong of which the law can take notice. To this, violations of absolute duties are an exception. There, remoteness of damage is material, not to found liability, but merely to ascertain the extent of responsibility when established. Here we are dealing with the case of an absolute duty, that of preventing one's animals from straying. Trespass is an actionable wrong in itself. "Every invasion of private property, be it ever so minute, is a trespass." (*Entick v. Carrington* [1765], 19 St. Tr. 1029.) And every trespass is said to import a damage. Therefore an action will lie for the trespass of an animal irrespective of the extent of the trespass or the amount of the damage done. Some harm, if only nominal, is always presumed. (*Ellis v. Loftus Iron Co.* [1874], L.R. 10 C.P. 10.) But on the one hand, "*de minimis non curat lex*," and on the other, some of the consequences of the wrong may be altogether too remote. It is therefore material to enquire whether the harm suffered was or was not too remote in order to settle for what consequences of the owner's act or default compensation is to be awarded. It is apprehended that those consequences are not too remote which the owner of the animal might have expected to result from its straying on the land of another.

¹ See Pollock's *Law of Torts*, 6th Edn, p. 28 *et seq.*, where the matter is discussed in detail.

The following extract from the judgment of Williams J. in *Cox v. Burbidge* ([1863], 13 C.B. (N.S.) 430), itself an action for negligence, gives us a clear statement of the law with regard to the trespass of animals to the land of others and the measure of the consequences for which the owner is held answerable.

“If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books that the animal is such that the owner of it may have a property in it which is recognisable by law. For instance, if a man’s cattle or sheep or poultry stray into his neighbour’s land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences.”

The rule as to remoteness of damage has been worked out only gradually and by particular cases.

In *Lee v. Riley* ([1865], 18 C.B. (N.S.) 722) it was established that the natural consequences of the trespass may include even harm caused by a spontaneous act of the animal. Through defect in fences which it was defendant’s duty to repair, his mare strayed during the night from his close into an adjoining field and so into a field of the plaintiff’s in which was a horse. From some unexplained cause,

the animals quarrelled, and the result was that plaintiff's horse received a kick from the defendant's mare which broke the leg of the horse and necessitated its being killed. The Court of Common Pleas held upon these facts that the defendant was responsible for his mare's trespass and that the damage was not too remote. Erle C.J. said: "It is plain that the defendant's mare was trespassing on the plaintiff's close; and I think it equally clear upon the evidence that the defendant's mare did inflict upon the plaintiff's horse the injury which was the cause of its death; the question is, whether or not the damage was too remote. The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question because the act which upon the evidence must be presumed to have caused the injury was not one which was characteristic of vice or ferocity in the mare in the ordinary sense.... I think there was abundant evidence to warrant the jury in coming to the conclusion that the defendant's mare did trespass on the plaintiff's close, and there did the injury of which the plaintiff complained." Montague Smith J. adopted the omission to keep up the fence as the ground of action but was even more explicit in the view that the damage was not too remote. "The only question is whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious, and that the defendant knew it. I do not think it was necessary to give any such evidence. The accident might have happened

without any vice in the mare; it might have been and probably was occasioned by the sudden meeting together of strange horses in the night-time. If even the plaintiff's horse committed the first assault the defendant would under the circumstances I think have been equally liable."

Although the actual trespass be trivial, yet if it be established, the owner will be liable for the natural consequences however disproportionate to the trespass they may seem to be. In *Ellis v. Loftus Iron Co.* ([1874], L.R. 10 C.P. 10) the plaintiff was the occupier of a field, a portion of which was, by arrangement, let to the defendants and fenced in by a wire fencing. Defendants' entire horse when turned into their plot bit and kicked plaintiff's mare through the fence. It was proved that defendants' horse did not cross the fence, but that both animals were close to the fence when the injury happened. It was also stated that the horse was a quiet tempered animal. Lord Coleridge C.J. in delivering judgment for the plaintiff in the Court of Common Pleas said: "The judgment of the County Court Judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt on the matter. It is clear that, in determining the question of trespass or no trespass, the Court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they

get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were; they were the natural and direct consequence of the trespass committed." But it is not a natural and probable consequence of allowing a horse to stray unattended in a highway that it should kick a child who happened to be playing there. (*Cox v. Burbidge* [1863], 13 C.B. (N.S.) 430.) Though the action in this case was in form an action for negligence, yet such a consequence has always been held too remote in the case of a trespassing horse.

In *Bradley v. Wallaces* ([1913], 82 L.J. (K.B.) 1074), a workman in the course of his duty was crossing his employers' yard when he was kicked by a horse which was standing unattended in the yard. The horse belonged to another firm whose man had left it standing whilst he helped their carter with his dray. The horse was not known by its owners to be vicious. The kick proved fatal and the dependants of the workman claimed compensation from his employers under the Workmen's Compensation Act 1906. The employers admitted liability but claimed to be indemnified under the provisions of Section 6 of the Act

by the owners of the horse. The Court of Appeal held that even if the horse were trespassing in the yard it was not an ordinary consequence of the trespass that the horse should kick the workman. The damage was too remote and the owners of the horse were not liable. "It is not in the ordinary course of things that a horse, not known to be vicious, should kick a man. So far as trespass is concerned, if a horse, pursuant to its natural instincts, eats a neighbour's hay, or in any other respects indulges its ordinary natural instincts, the owner may be liable, but otherwise not. The damage in the present case does not naturally flow from the trespass, and is not an ordinary consequence of the trespass. It is too remote" (per Cozens-Hardy M.R.).

It is submitted that the doctrine of scienter (which will be fully dealt with hereafter) as such has no true application in cases of this sort. Whether the animal was vicious and whether the owner knew it, the question resolves itself solely into one of remoteness of damage. With regard to the case of injuries to human beings, the limits of liability seem to be the same whether the ground of action is trespass, negligence or a breach of the absolute duty. But this would seem to be only accidental, and it is doubtful whether the liability in trespass and the liability under the absolute duty exactly coincide in every case. It will be necessary to refer to this matter in another place of this work.

One writer, citing the cases of *Lee v. Riley* ([1865], 18 C.B. (N.S.) 722) and *Ellis v. Loftus Iron Co.* ([1874], L.R. 10 C.P. 10) puts the law in this way: "Where an animal is a trespasser, it is immaterial that an injury

done by it is due to the animal's vice. The owner in such case is liable for all the damage it may do, whether the damage is such as may reasonably be expected from the nature of the animal or is due to mischievous propensities of which the owner is ignorant." (Addison on the *Law of Torts*, 6th Edn, p. 129.) With deference, it is submitted that this is rather a misleading statement. It would lead one to suppose that the liability extended even to remote consequences, which is certainly not the case. Thus in the case of *Bradley v. Wallaces*, just quoted, Kennedy L.J. said: "The learned County Court Judge, if, as I hope, I follow his line of reasoning, seems to have thought that, directly you have a horse in a position which renders its owner constructively a trespasser, every damage done in any way by the horse to any person or to the property of any one is an actionable wrong. I venture to think that such is not, and never was, the law." In the same case Swinfen Eady L.J. generalises the rule in these terms: "The guiding principle is that a person is liable only for the natural and probable consequences occasioned by or resulting from trespass, or negligence; an injury suffered must be brought within this degree to give rise to a cause of action."

In certain cases the common law adopted an exceptionally stringent rule of responsibility for wrongs resulting from acts (not necessarily wrongful) exposing the person or property of others to extraordinary risk of harm. The duty imposed in such cases was not merely a duty of using reasonable care and caution, but an absolute duty of insuring others

against resulting harm; at any rate, so long as such harm was not due to a cause altogether beyond human foresight and control. The mere fact of the harm having happened gave rise to a liability which was not capable of being avoided by showing that even a degree of diligence proportioned to the exigencies of the case had been observed. For instance, the possessor of loaded firearms, explosives, or poisons; the person who kindled fire in an unusual place or for an extraordinary purpose; the person who brought on his land and kept there anything likely to do mischief if it escaped, must be prepared to be answerable to others for any damage which resulted, within the limits before indicated. No satisfactory evidence in support of any of the theories as to the origin of the rule has as yet been advanced. But it seems tolerably certain that in the Anglo-Saxon law this duty of insurance, instead of being exceptional, was the general legal doctrine at the basis of all liability in tort. The policy of the adoption of such a stringent rule, or at any rate of its retention in modern times in the few cases in which it does exist, has been the subject also of much discussion; but the matter is outside the scope of this present work¹.

In modern times the general principles of liability have undergone a great modification, and the cases of strict responsibility now remaining are so difficult to piece into the modern legal system that they themselves are in the highest degree exceptional. Cattle-trespass is probably the oldest instance of this strict liability.

¹ For a discussion of these exceptional cases see Pollock's *Law of Torts*, 6th Edn, Ch. XII.

Under the early practice, damage caused by straying cattle was remediable in an action of trespass. Now the action of trespass was the appropriate remedy for direct and forcible injuries either to the person or to property. Forcible injuries are those due to physical interference or contact. Direct injuries are such as follow immediately upon the act of the wrongdoer. Injuries which, by reason of some intervening circumstance, cannot be regarded as part of the defendant's act are said to be "consequential injuries." Redress for injuries which were either not forcible or not direct but consequential had to be sought in an action of trespass on the case, more shortly termed "case," or "an action on the case." The question whether trespass or case lay, did not depend on whether the injury was intentional or accidental. If the injury were direct and forcible, trespass was the proper remedy, whether the injury was the result of intention or negligence. If the injury were consequential, case was the remedy even if the injury was intended. In certain cases either remedy was available, that is to say, where the same act produced both a direct and a consequential injury. Here the plaintiff might have an action of trespass alleging the consequential injury as special damage, or he might waive the trespass and take his remedy in case for the consequential injury alone. "Trespass for the entry of diseased cattle into the plaintiff's close per quod the plaintiff's cattle were infected. Not guilty pleaded, and a verdict for the plaintiff for 20s. It was moved to allow the plaintiff his full costs, upon the account of the special damages alleged and put in issue, and which would have sub-

sisted of itself as a distinct cause of action, and the plaintiff ought not to be punished for joining it with the trespass, to avoid vexation. And Cro. Car. 163, 307, 3 Mod. 39, 2 Ventr. 48, Cro. Car. 141, Ray 487 were cited. On the other side it was insisted, that though here is matter of aggravation laid yet it is still to be considered as an action of trespass, in which there is a recovery under 40s. And matter alleged only by way of aggravation cannot intitle the plaintiff to full costs (2 Ventr. 48, Salk. 642). The Chief Justice, Powys and Fortescue Justices, were for full costs, because the consequential damage is a matter for which the plaintiff might have had a distinct satisfaction. And they likened it to the case of an action of battery, per quod consortium of the wife, or servitium of the servant amisit, which for that reason are not within the statute¹. The true distinction is, where the matter alleged by way of aggravation will intitle the party to a distinct satisfaction. Asportation of trees may be a ground for a trover, but yet may be laid as an aggravation in trespass, and the plaintiff shall have full costs. If a man enters and chases and kills my cattle, that is a distinct wrong, but yet may be joined as matter of aggravation. Suppose I have two closes at a great distance, and the same water-course running through both, I may allege the entry into one, per quod the water was prevented from coming to the other, and there shall be full costs. Eyre J. contra. Because this recovery will not be pleadable to a special action upon the case for the special injury, quod caeteri negaverunt. And the plaintiff had full costs."

¹ *Semble* 22 and 23 Car. II, c. 9.

(*Anderson v. Buckton* [1719], 1 Str. 192¹.) The distinction between the two forms of action was important. The wrong which was remediable in trespass was actionable *per se*, i.e. without proof of damage. A nuisance or other wrong actionable only on proof of damage was the subject of an action on the case.

Bearing the above explanations in mind, if a person drives cattle on the land of another, this being a forcible and direct injury is remediable in trespass. But if by reason of insufficient fencing or watching, cattle stray on the land of another and do damage, this, being a consequential injury merely, is remediable in case, strictly speaking. But this is just where the actual practice differed. Though it would seem to be an anomaly, yet, under the old practice, cases of the latter sort were remediable in trespass.

That the general rules of the law of trespass are applicable to the cases of straying cattle is substantiated by the following considerations. First, there seems to be no doubt that cattle trespass is actionable *per se*. (*Ellis v. Loftus Iron Co.* [1874], L.R. 10 C.P. 10, ante, p. 40.) Secondly, the liability extends only to the trespass of cattle and other animals in which at common law a right of property could exist, and such a condition was a *sine qua non* of the remedy in an action of trespass. However this may be, the material point is that trespass was in practice the appropriate form of action, and the reason possibly was that the wrong is not akin to nuisance, which ground seems to underlie most of the few other cases of strict responsi-

¹ This case was disapproved in *Daubney v. Cooper* ([1830], 10 B. C. 831) though only as to the question of costs.

bility at the present day remaining in our law. These cases of absolute liability are said to have received their generalisation in the case of *Rylands v. Fletcher* ([1868], L.R. 3 H.L. 330), where the House of Lords affirmed and adopted a judgment of the Exchequer Chamber in these terms: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God.... The person whose grass or corn is beaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own. And it seems but reasonable and just that the neighbour who has brought on his own property something which was not naturally there—harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's—should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for

the natural and anticipated consequence. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." (L.R. 1 Ex. p. 279.)

The instances recited in the judgment, except that of escaping cattle, are all wrongs in the nature of a nuisance. They are instances of the unnatural user of land—of cases where a person has brought something on his own property which was not naturally there. How can this be said of cattle and like animals? What more natural use can there be of land than to keep cattle upon it?

The foregoing considerations all point to the conclusion that the so-called "rule in *Rylands v. Fletcher*" did not find its source in the original cases of strict liability of which cattle-trespass was the type.

SECTION IV. *Exceptions to liability*

Liability for trespass of animals is excluded where:

(a) the trespass is involuntary; or

(b) the trespass is due to vis major, or the act of God; or

(c) the trespass is occasioned by the omission of a third person whose duty it was to keep a fence in repair and over whom defendant had no control; or

(d) the plaintiff is bound by law to fence out defendant's cattle and he omits to do so; or

(e) the trespass is committed from a highway where the animals are lawfully passing.

Enquiry must now be made as to what exceptions there are to the absolute duty of preventing the escape of animals and their trespass to the lands of others.

And first, in general, no action lies for an "involuntary trespass." This applies not only to the case of animals but to the law of trespass generally, and there is abundance of authority for it. But what constitutes an involuntary trespass in the case of animals is not quite clear. Apparently where the owner of the animal is present and cannot by any reasonable or available means prevent the trespass, no liability attaches to him in law. To be "involuntary" the trespass must occur at a time when the owner of the animal has the opportunity but not the ability to exercise his "voluntas."

An early authority for the exception in the case of animals is the dictum of Catesby J. (in Y.B. 22 Edw. IV, fo. 24): "If a man comes with a drove of cattle on the high road past where trees or corn or other crops are growing, then, should any of the beasts eat from these crops, the man who was driving them would have a good defence, provided the thing happened against his will. For the law understands that a man cannot control his cattle all the while. But if he permitted them, or if he let them continue, then it would be otherwise¹."

Similarly it is laid down in 2 Rolle Abr. 566, pl. 1, that if cattle, in passage on the highway, eat herbs or corn "*raptim et sparsim*," against the will of the owner, it will excuse the trespass.

¹ Quoted in Prof. Courtney Kenny's *Select Cases on the Law of Torts*, p. 600.

“Millen port action de trespass vers Fawtry pur enchaser ove un chiene ses barbits al Dale en un close appell. B. close, le defendant plede en barre que il ad un estate en Whiteclose en S. parish adjoinant al dit B. close & que le dit barbits fueront damage fesant en W. close & il ove un petit chiene enchase le dit barbits al B. close, & tam cito que il vient a le dit chiene il luy recall & revoke que fuit mesme le trespass, & sur ceo le plaintiff demurre en ley. Et cest terme il fuit resolve per tout le court, scilicet, les 4 justices, que le action ne gist, car il fuit legal al party per luy mesme, ou per un chiene a chaser ses barbits hors de son terre esteant la damage fesant, & coment le chiene eux enchase en le close d’un auter, tamen quant il luy recall tam cito que poterit, ceo ne fait luy trespasser....” (Millen v. Fawtry [1625] Jon. W. 131, Termino Pasch. An. 11 Caroli Regis, in Banco Regis.) It is the same case apparently which is more fully reported in Poph. 161, under the title of Mitten v. Faudrye, an instance of the corruption of case names. See also Latch. 119, where Littleton J. is reported as adopting a similar view. In the report of the case in Popham, Doderidge J. agreed that trespass did not lie “for here was no hedge, and when he saw them out of his own ground, he rated the dog, . . . and the nature of a dog is such that he can not be ruled suddenly, and here it appeareth to be an involuntary trespass. A man is driving goods through a town, and one of them goes into another man’s house, and he follows him, trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily, and so it is injuria, and a hurt to another, and so it is damnum.”

The same principle was applied in the case of *Beckwith v. Shoredike* ([1767], 4 Burr. 2092), where it was laid down that "if A goes along a footpath, and his dog happens to escape from him and run into a paddock, and pull down a deer against his will, it is no trespass."

Secondly, it seems that the act of God or vis major would be an excuse. The case of *Powell v. Salisbury* ([1828], 2 Y. & J. 391) is cited by some writers as an authority, but it does not support the exception in any respect; for first, the action there was in case for neglect to repair fences; secondly, the point was taken by counsel in the course of argument only; and thirdly, the case was not one of damage caused by animals. The plaintiff declared in case against the defendant, for not repairing his fences per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack: held that the damage was not too remote, and that the action was maintainable.

The exception from the general rule was allowed, however, in the judgment of the Exchequer Chamber in *Rylands v. Fletcher* ([1866], L.R. 1 Exch. 265), and was subsequently acted upon in the decision of the same court in the case of *Nichols v. Marsland* ([1875], L.R. 10 Ex. 255). But in the latter case the term was not used in its strict sense of "an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects." It was held to be enough that the occurrence should be such as human foresight could not be reasonably expected to anticipate. Whether, in regard to trespass by animals, vis major or the act of God has the extended

meaning one cannot say, as there appears to be no case directly in point. If, as is submitted, the general rules of liability for trespass are applicable, it would seem to follow that the strict meaning should be given to the term in this connection.

The defendant is not liable where the trespass was occasioned by the omission of a third person whose duty it was to keep the fences in repair and over whom defendant had no control. Thus in *Wiseman v. Booker* ([1878], 3 C.P.D. 184) a railway company let surplus land to the plaintiff, separating it from the adjoining land not taken by means of an open fence four feet high. The plaintiff planted his land with vegetables and these were damaged by horses kept on the adjoining land of the defendant. It appeared that the fences being insufficient, the horses put their heads through and over them and so were enabled to commit the acts of harm complained of. The railway company were under a statutory obligation to maintain the fences. Lopes J. said: "The action is brought in respect of the defendant's horses straying on lands of the plaintiff and destroying his crops. The answer is that the damage was occasioned by defect of a fence which the defendant was under no liability to make and maintain, but the making and maintenance of which was a duty cast by the Act of Parliament (Railway Clauses Consolidation Act 1845, s. 68) upon the railway company whose tenant the plaintiff may for this purpose be assumed to be. The liability cast upon the company by the Act is very much like the old prescriptive liability to fence." And per Lindley J.: "The plaintiff cannot be in a higher or better position

than the railway company. The defendant cannot be made responsible for their breach of duty."

A plea in an action of trespass for injury done by cattle that the plaintiff is bound to fence against the defendant's cattle is a good plea. (Y.B. 19 Hen. VI, 33, pl. 68; *Nowel v. Smith*, Cro. Eliz. 709. See also *Singleton v. Williamson* [1861], 31 L.J. (Ex.) 17.)

Where animals stray upon private property from a highway along which they are lawfully passing at the time, their owner is not liable unless it happened through his negligence. This is a well settled rule of law the modern ground for which is public convenience. "There is *prima facie* a public right to and a public advantage in the use of the highway by the public for the usual purposes of trade and traffic, and if the owner of adjacent land were allowed to leave the same unfenced, and entitled at the same time to make any person driving animals along the highway responsible for their straying on to such lands, the use of the highway would be restricted or rendered onerous by the sweeping liability thus imposed....The principle must be, it would seem, that the landowner who does not choose to protect his land from the road cannot impose a liability so burdensome to the usual and legitimate use of the highway on the owner of animals." (27 Sol. Journ. 81.) Beyond noticing here that the case of cattle straying from a highway is an exception to the general rule of liability for trespass to land, it is not proposed to examine the matter now, but to defer consideration in detail until the question of liability for negligence in the control of animals is discussed (post, p. 147).

PART III

INJURIES TO THE PERSON AND TO OTHER ANIMALS, AND DAMAGE TO GOODS

SECTION I. *The absolute duty*

1. (1) A person who keeps an animal of a notoriously ferocious, dangerous or mischievous species keeps it at his own risk, and is liable for the consequences of any act of harm committed by it.

(2) It is immaterial whether he has been negligent in keeping the animal, whether he knew of its dangerous or mischievous nature, or even whether he had good reason to believe that the particular animal was docile and harmless. Both negligence and knowledge are presumed by the law.

The terms "ferocious, dangerous or mischievous" are intended to cover all kinds of harm. For the sake of brevity, however, in the following pages harmful animals are referred to generally as "dangerous animals" as distinguished from "domestic" or "harmless animals."

The rule above stated is said to be a particular application of the broad principle laid down in *Rylands v. Fletcher*, namely, that if a man brings upon his land something which would not naturally come upon it, and which is liable to do mischief, being in itself dangerous, he must take care to control it so that it does not do any mischief, and he takes that risk upon himself. "The subject of liability for damage done by dangerous animals is a branch of the law to which that principle has been applied in the same way from the times of Lord Holt and Hale down to the present time. People must not be wiser than the experience of mankind. If that experience shows that animals of a particular class are dangerous, even though individual animals of that class may be tamed, yet a man who keeps one of that class does so at his own risk and is responsible for any damage which may be done by it." (Bowen L.J. in *Filburn v. The People's Palace, etc. Co.* [1890], 59 L.J. (Q.B.) 472.) The following illustrations suffice to show the strict nature of the liability, though to a certain extent they anticipate the discussion upon liability for harm caused by the keeping of domestic or harmless animals.

1 Hale Pleas of the Crown 430 *b*: "These things seem to be agreeable to law, (1) If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable for an action for it. (2) Though he have no particular notice, that he did any such thing before, yet if it be a beast, that is *ferae naturae*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it

adjudged in Andrew Baker's case, whose child was bit by a monkey, that broke his chain and got loose. (3) And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." Here we have a clear opinion that the liability is absolute and that negligence need not be shown.

An equally strong authority is *R. v. Huggins* ([1730], 2 Ld Raym. 1583) where both civil and criminal responsibility are dealt with. "There is a difference between beasts that are *ferae naturae* as lions and tygers, which a man must always keep up at his peril; and beasts that are *mansuetae naturae*, and break through the tameness of their nature, such as oxen and horses. In the latter case, an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies, without such notice. As to the point of felony, if the owner have notice of the mischievous quality of the ox, etc. and he uses all proper diligence to keep him up and he happens to break loose and kill a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad after warning or notice of his condition, it is the opinion of Hale, that it is manslaughter in the owner. And if he did purposely let him loose, and wander abroad, with a design to do mischief; nay, though it were but a design to fright people and make sport, and he kills a man; it is murder in the owner."

The duty cast upon the person who keeps a dangerous animal is absolute. He becomes an insurer against harm resulting from his act. This does not seem to have been settled law previously to 1846 when the case of *May v. Burdett* (9 Q.B. 101) did something towards clearing up many doubts and difficulties. Hitherto it had been a question whether want of due care was not the ground of the action. A uniform course of pleading had not been adopted. In some cases, besides breach of an absolute duty, negligence had been expressly averred in the declaration; on the other hand, precedents of declarations existed in which the absolute duty alone was treated as the ground of action. Under the earlier practice, however, it was usual to draw a separate count averring negligence in not keeping the animal secured.

The authorities on both sides were collected in argument and examined by the Court in *May v. Burdett*, and a considered judgment was delivered which settled this particular question once for all. In that case the declaration stated that the defendant wrongfully kept a certain monkey "well knowing that the said monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind and that it was dangerous and improper to allow the said monkey to be at large and unconfined" and that the said monkey, while being so kept, did attack and bite the plaintiff. Upon a verdict for plaintiff and motion to arrest judgment it was objected that the declaration was bad because it omitted to aver negligence in keeping the animal.

The cases cited in argument were almost all cases

of injury by domestic or harmless animals; and in truth, the keeping of a naturally dangerous or ferocious animal appears to have been rarely the subject of consideration by the Courts before this time. It is significant that the Court did not treat this case as one of injury by a dangerous animal, as no comment was made on the fact that the averment of knowledge, or "scienter" as it is technically called, had been included in the statements of the declaration. It was rather assumed than questioned that it was proper to allege the scienter in such a case. Since the decision in *Filburn's case* (ante, p. 14) the monkey would undoubtedly rank with dangerous animals.

Lord Chief Justice Denman in delivering the judgment of the Court (Denman C.J., Pattison, Coleridge and Wightman J.J.) said: "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities....The conclusion to be drawn from an examination of all the authorities appears to us to be this; that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice."

A learned American writer finds nothing in this

language to impose an absolute duty. He says: "the decision in this case seems to be that the keeper of such an animal is *prima facie* responsible for the injuries done by it, but it is not decided that he may not meet the case by showing that he observed in respect to it proper care." (Cooley, *Torts*, 348.)

The presumption of negligence, if indeed it can be called a presumption at all, is a "*praesumptio juris et de jure*," that is, one in respect of which no evidence can be given in rebuttal. The so-called presumption amounts to positive proof. The negligence is rather "implied" than "presumed" by the law.

Although the duty of preventing a dangerous animal from causing harm is an absolute duty independent of negligence, yet an action will lie for negligently keeping such an animal so as to cause damage. In *Wyatt v. The Rosherville Gardens Company* (2 T.L.R. 282) the plaintiff had received injuries from the bite of a bear belonging to the defendants and he sought to recover damages on the ground that the bear had been kept by the defendants in an unsafe and improper cage which was dangerous to the public. The bear was kept at defendants' pleasure-gardens in a cage whose railings in some places were $4\frac{1}{2}$ inches apart. The plaintiff, wishing to see the animal, entered the gallery where the cage was and the bear, putting its paw through the bars, injured the plaintiff's arm. No notice was exhibited to warn persons not to enter the gallery, and the steps up to the entrance had a well-worn appearance. In summing up the case to the jury, Mr Baron Huddleston is reported to have said that if persons chose to keep wild and

savage animals—such, for instance, as a bear, a tiger, or a lion—they did so at their own risk and peril; and if any such animal caused injury to anybody, they would be liable for the injuries....In this case it mattered not whether the defendants knew or did not know that this bear was savage—they were equally liable and responsible in either case. This being the state of the law, his Lordship continued, had plaintiff's counsel asked him to decide the case on the law alone, he would have had no hesitation in doing so in his favour; for, in his Lordship's opinion, the question of negligence had nothing whatever to do with the defendants' liability in this case. But to prevent further litigation it was better to dispose of the case upon the facts and he would therefore leave two questions to them—(1) Were the defendants guilty of negligence? (2) If they were, then did the plaintiff, by his own course of conduct, contribute to the accident? The jury found for the plaintiff on both questions and judgment was given accordingly.

In *Besozzi v. Harris* ([1858], 1 F. & F. 92), another "bear" case, evidence of the tameness of the animal was received, in the circumstances of the case, not by way of answer to liability, but in reduction of damages. In addressing the jury, Crowder J. said: "The statement in the declaration that the defendant knew the bear to be of a fierce nature, must be taken to be proved, as everyone must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time; this case shows that it may wake up at any time. A person who keeps such an animal is bound so to keep it that it shall do no damage."

This case marks the halfway stage as to the allegation of scienter with regard to dangerous animals. In *May v. Burdett*, twelve years previously, the allegation of knowledge was apparently thought to be properly included in the statements of the declaration. Here is seen the progress towards the stage where knowledge is immaterial in the sense that the law presumes it.

The law received its final expression in *Filburn's* case (ante, p. 14), the latest of its kind. There it was held that a person who keeps an animal of a dangerous class does so at his own risk and is responsible for any injury done by it, even though individual members of that class of animals may be tamed. In this case, at the trial before Day J. the questions whether the elephant was an animal dangerous to man and whether it was known to the defendants to be dangerous, were put to the jury and answered in the negative. But on appeal the Court thought the first question had been asked out of extreme caution and that both questions were immaterial.

Although, as stated above, the rule as to the liability for wrongs due to the keeping of dangerous animals, or of animals known to have dangerous propensities, is said to be an application of the broad principle laid down in *Rylands v. Fletcher*, it differs from this principle both in character and in origin.

It has already been mentioned that there were certain cases in which the common law adopted an exceptionally strict rule of liability, and that these were cases of wrongs resulting from acts (not necessarily wrongful) which exposed the person or property of

others to an extraordinary risk of harm, and several instances of such cases have been given. It is generally considered that the liability for injuries caused by the keeping of animals falls within this class of cases.

The case of *Rylands v. Fletcher* (as may be seen from the terms of the judgment therein, an extract from which is quoted ante, p. 48) dealt with the duty of preventing the escape from one's land of something likely to do harm. In the other, the wider, class of cases, responsibility is not confined to the escape of objects likely to do harm but extends to the mere keeping of such an object. This *May v. Burdett* clearly shows. "It was said, indeed, further, on the part of the defendant, that the monkey being an animal *ferae naturae* he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it; we are, besides, of opinion, as already stated, that the defendant, if he would keep it was bound to keep it secure at all events¹."

¹ The Court, in effect, refused to adopt and apply to the case of dangerous animals the rules which obtained in the Roman law with regard to the escape of animals *ferae naturae*. The truth is that in this connection the terms *ferae naturae* and *domitae naturae* are used in English law in a different sense to that of the Roman law. For the purposes of ownership, a monkey is an animal *ferae naturae*, and so is a rabbit for example, but different considerations apply in English law to the case of the escape of each.

Further, the absolute duty to prevent harm by dangerous animals is distinguished from the other cases of strict responsibility in two particulars: first, as a rule the wrong consists simply in the doing the act which results in harm; in the case of the keeping of animals a further element is necessary before the duty is violated, namely the element of knowledge. Secondly, in the general case where the law raises an absolute duty, the act of the person responsible in exposing others to the extraordinary risk is not of itself a wrongful act. In the special case of animals, the act of keeping the animal, without more, is (semble) a wrongful act.

The law has always insisted that liability for harm caused by animals (apart from trespass or negligence) should be based upon the existence of the fact of knowledge, on the part of the owner, of a propensity to cause harm of the kind which actually has occurred. This knowledge in one class of cases must be alleged and proved; in another class of cases it is presumed by the law itself. The presumption in the latter case, like the presumption of negligence referred to above, is a *praesumptio juris et de jure*, that is to say, one for whose rebuttal no evidence may be given. The grounds for liability thus contain a personal element—an element, moreover, which is anomalous in this respect, that it occurs in connection with civil responsibility. If the law had cast upon the person who keeps animals the duty of insurance simpliciter, without regard to knowledge of a propensity to do the kind of harm which has occurred, the principle of liability would have proceeded upon a more rational ground.

The second particular in which the case of injury by animals differs from the other cases of strict liability is the quality of the act which results in the injury. And this brings us to the origin of the rule of absolute liability in these animal cases. The origin is not to be found in the principle laid down in *Rylands v. Fletcher*, but in the view taken in the earlier law that the keeping of a dangerous animal is in itself a wrongful act. Mr Salmond and Sir Frederick Pollock are both of opinion that the view that the very act of keeping a dangerous animal is itself wrongful, and therefore a ground of liability if damage ensues, can no longer be accepted as sound. Mr Salmond at p. 388 of his work on Torts says: "Even in the case of wild beasts, there is nothing illegal in the possession of them. The keeping of a wild-beast show is a perfectly lawful business, no less than the keeping of cattle, yet tigers and cows will both do mischief after the custom of their kind if they are allowed the opportunity." But the law assumes that harmless animals like the cow do not do mischief at all, in the sense in which the matter is now being considered. If Mr Salmond's reasoning were correct there would be no point in the requirement of scienter, and the rules relating to that difficult branch of the law would be superfluous.

Sir Frederick Pollock instances the case of the Zoological Gardens which, in accordance with the present view, would be a public nuisance. As a matter of fact that instance was put by counsel for the defendant in *May v. Burdett* and it did not find sympathy with the Court.

If the keeping of a dangerous animal is not a wrong in itself, it has been said that on principle no wrong can come from it until some wrongful circumstance intervenes: in other words, until there is negligence. But it is undoubted law at the present day that allegation and proof of negligence are unnecessary. This argument of course will not hold, for it might be said that the intervening wrongful circumstance is not negligence but the failure to prevent harm being caused.

What is the state of the authorities? There is ample authority in the earlier cases for the proposition that the keeping of an animal which is known to be dangerous is in itself a wrongful act. For example:

(1) The form of the declaration in *May v. Burdett* given on page 58 ante, and the extracts from the judgment of Lord Denman quoted on the page following.

(2) The case of *Jackson v. Smithson* ([1846], 15 M. & W. 563), where the declaration in case stated that "the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt and injure mankind; and that the said ram, while the defendant so kept the same, attacked butted and threw down and thereby hurt the plaintiff," this was held sufficient on motion in arrest of judgment, without any allegation or proof that the defendant negligently kept the ram. The Court of Exchequer Chamber held that they were bound by the decision of *May v. Burdett* on this point. Counsel for defendant clearly drew the attention of the court to the question of the quality of the keeping. He pointed out that the reasonable meaning of the mere allegation that the defendant "wrongfully and injuriously" kept the

animal was, not that the defendant "improperly" kept the animal, but that it was an improper thing to keep it at all. In the course of his judgment, Mr Baron Platt said: "No doubt a man has a right to keep an animal which is *ferae naturae*, and no one has a right to interfere with him in doing so, until some mischief happens; but as soon as it has done an injury, then the keeping it becomes, as regards that person, an act for which he is responsible." This passage is often quoted as an authority for the view that the keeping a dangerous animal is not a wrongful act. But, in the first place, suppose the words to bear their literal meaning, then, even when so interpreted, it is submitted that the passage on examination will be found in no way inconsistent with the view of the other judges. The fact that the act is wrongful in itself does not make it wrongful with regard to any particular individual until he suffers harm as a consequence of it. The truth is, that the right of that individual against the owner of the animal is only a "qualified right," that is to say, a right to claim that the act shall not be done to his prejudice. Damage is an essential part of the action. But it may be objected that that would be an instance of "*injuria sine damno*," a position which cannot exist in law. The answer is that "*injuria*" in that phrase means not simply a breach of law, but that limited kind of breach of law which consists in the violation of another's private rights. It is submitted that when the learned judge made the remarks concerning animals *ferae naturae* he could not have had sufficiently in mind the case of animals which are dangerous by nature and are universally recognised to

be so. Otherwise he would have been enunciating a proposition directly opposed to the law of *May v. Burdett* by the decision in which case the Court of which he was a member expressed itself to be bound.

(3) In *Card v. Case* ([1848], 5 C.B. 622), counsel said, *arguendo*, that the keeping a savage dog or other ferocious animal, *per se*, is not a wrongful act; the wrongful act is, the so keeping it as to cause injury: the gist of the action is the negligent keeping. Mr Justice Maule interposed with the following remarks: "You are directly at issue with *May v. Burdett* and *Jackson v. Smithson*. The allegation of duty is quite immaterial. (*Brown v. Mallett* [1848], 5 C.B. 599.) The utmost diligence will not excuse the defendant, if the dog was of a ferocious disposition and the defendant knew it....In the three last cited cases [*Taverner v. Little* (5 N.C. 678), *Dunford v. Trattles* ([1844], 12 M. & W. 529) and *Hart v. Crowley* ([1840], 12 A. & E. 378)] apart from the injury, the proprietorship of the cart, the ship, and the waggon was innocent. If you can convince us that the keeping a ferocious dog is an innocent thing, you will have made some way." Counsel then put the case of a person keeping poison, or a loaded gun, and mischief resulting. And *per Maule J.*: "There the act would not be unlawful, unless there were culpable negligence."

In delivering judgment *Coltman J.* said: "What is the wrongful act here alleged? Looking at the frame of this declaration, it may be said that the negligently keeping the dog was the wrongful act charged; but that is overlooking that which is the

gist and substance of the action. It is clear from the case of *May v. Burdett*—where the matter underwent very great consideration—that the circumstance of the defendant's keeping the animal negligently, is not essential; but that the gravamen is, the keeping a ferocious animal, knowing its propensities, and the consequent injury to the plaintiff....In the present case the wrongful act was not the negligent mode of keeping the dog, but the keeping it at all knowing its ferocious disposition." Mr Justice Maule was of the same opinion. "Now the cases of *May v. Burdett* and *Jackson v. Smithson*, and the general course of precedents and authorities referred to in the former case, prove that the wrongful act is, the keeping a ferocious dog, knowing its savage disposition, and that an action of this sort may be maintained without alleging any negligence. The declaration here, idly and superfluously, states a duty to arise on the defendant's part—as in *Brown v. Mallett* ([1848], 5 C.B. 599)—to use due and reasonable care and precaution in and about the keeping and management of the dog....It may be that the allegation of negligence, coupled with the consequent damage to the plaintiff, would show a cause of action. Here, however, there is no doubt that the declaration contains a sufficient allegation of a cause of action. It states a wrongful act—the keeping a ferocious dog, knowing its disposition—and damage to the plaintiff."

(4) In the recent case of *Baker v. Snell*, Sutton J. in the Divisional Court ([1908] 2 K.B. 352) and Cozens-Hardy M.R. and Farwell L.J. in the Court of Appeal ([1908] 2 K.B. 825) were all of opinion that it is a

wrongful act to keep an animal which is known to be dangerous, and their judgments in that case were founded on that opinion.

On the other hand, besides the dicta of Platt B. in *Card v. Case* which have been already dealt with, there is some authority against the view that the keeping a dangerous animal is a wrongful act.

In the old cases of *Brock v. Copeland* ([1794], 1 Esp. 203) and *Sarch v. Blackburn* ([1830], 4 Car. & P. 297), Lord Kenyon and Tindal C.J. respectively were of opinion that a person has a right to keep a fierce and dangerous dog for the protection of his property. In *Baker v. Snell* (*supra*), Kennedy L.J. adopted the dicta of Platt B. in *Card v. Case*, and held that there is nothing culpable or wrong in keeping an animal *ferae naturae*, that is, a dangerous animal. But he also stated that the gist of the action was the *scienter*, and this is directly in the face of dicta in the cases of *May v. Burdett*, *Jackson v. Smithson* and *Card v. Case* that the gist of the action is the keeping the animal after knowledge.

In the still more recent case of *Clinton v. Lyons* ([1912] 3 K.B. 198), Bray J. remarked that the dictum of Farwell L.J. in *Baker v. Snell* went too far in his opinion, and he refused to hold that it is a wrongful act to keep a cat which, whilst with kittens, is dangerous to dogs. With respect, it may be said that his reasons for so holding are not quite to the point.

In the result, having regard to the clearly expressed opinions in the earlier cases, that the same have never been overruled or even directly doubted until quite recently, and that there is an opinion of the Court of

Appeal in favour of the view, it is submitted that the law is still that the keeping of a dangerous animal is a wrongful act, whatever may be the consequences of such a rule.

The matter is important when we come to consider what exceptions there are to liability.

2. (1) The person who keeps a domestic or harmless animal is not liable (apart from negligence or trespass) for harm caused by acts which the animal has a natural tendency to commit.

(2) Moreover, at common law, no liability (apart from negligence or trespass) attaches to him for harm caused by acts of a vicious or mischievous character which are foreign to the ordinary nature of such an animal. But if he knows that the particular animal possesses a propensity or disposition to commit acts of that character, either generally or under special circumstances, then he keeps the animal at his peril and becomes absolutely liable for any harm which may ensue. Proof of such knowledge is technically called "proof of the scienter."

(3) Apart from statute, liability does not depend upon ownership but upon possession. He who keeps or controls the animal is responsible, and the question whether he keeps or controls the animal is one of fact. It is a

sufficient "keeping" if he harbour the animal or habitually allow it to have access to his premises. But no liability accrues to the occupier for the acts of an animal which strays upon his premises, if nothing has been done to encourage its presence or reasonable care has been taken to prevent its continued access.

The rules as to the determination of liability for acts of harm by domestic animals or animals harmless by nature are more complex than those relating to dangerous animals, and involve fine distinctions, particularly in regard to proof of knowledge. Broadly it may be stated that, apart from liability in trespass or for negligence, the person who keeps such an animal is not liable (1) for acts which are ordinarily committed by such animals, or (2) for acts which are not usually committed by such animals because they are not within the ordinary nature of that species of animals. But he becomes responsible for acts of the latter character which cause injury or damage, upon proof that at the time of the commission of the act, he knew that the particular animal possessed a propensity or disposition to commit acts of that character.

It is usual and convenient to speak of the "owner" of the animal as being the person liable, for in the majority of cases the animal is in his possession or under his control. But as is stated above, liability does not depend upon ownership; and this fact should be borne in mind in reading these pages where the term "owner" is constantly being used.

The liability for trespass of animals has already been adverted to, and the question for what consequences of such trespass the liability extends has been considered. Cases have been dealt with and numerous authorities have been quoted to show that a person is liable for the direct consequences of such trespass but not for remote consequences. A person is liable for the damage done by his cattle or other animals trespassing on another's close and doing damage of the kind which might be expected of them, such as trampling down crops or eating herbage. Such damage is that which it is the ordinary nature of such animals to commit, is therefore not too remote, and may be recovered for in the action of trespass.

The same is the case if we turn to the law of negligence. A person is liable for the ordinary acts of his animals under circumstances which cast upon him the duty of taking care to prevent the committal of such acts. Therefore a person who negligently leaves his horse unattended in the street is responsible if it moves on and in so doing causes harm, as for instance by a collision. (*Illidge v. Goodwin* [1831], 5 C. & P. 190; *Whatman v. Pearson* [1868], L.R. 3 C.P. 422.)

But apart from trespass or negligence, the owner of the animal is not responsible for damage caused by acts which it is natural to a domestic or ordinarily harmless animal to commit. To put the matter briefly, there is no liability in such a case under what may be called "the rule in *May v. Burdett*." A different view appears to be taken by Mr Salmond on this point. In his treatise on the law of Torts (third edition, p. 383 et seq.) he states that all harm done by

animals is of two kinds: (1) harm which is natural to that species of animal; (2) harm which is not natural to the species, but which is nevertheless done by the particular animal in question. "In the first case the owner of the animal is not permitted to allege that he did not know of its tendency to do the mischief; he is conclusively presumed to have known the ordinary character of that species of animal; nor is it any defence to him that he had good reason to believe that the individual animal had no tendency to do such harm, although natural to the species. In the second case, on the other hand, actual knowledge of the tendency of the individual animal to do the harm which it did must be proved by the plaintiff.... Thus it is a natural tendency of cattle to stray and trespass, and eat and tread down crops; and it is the natural tendency of tigers and other wild beasts to attack mankind and other animals. In such a case, therefore, no proof of scienter is necessary. Knowledge is presumed by the law, and this presumption is conclusive so as even to exclude evidence that the individual animal was reasonably believed to have no tendency to act after the manner of its kind. On the other hand, it is not the natural tendency of dogs to bite human beings; therefore it is necessary for the plaintiff in such a case to prove that the defendant actually knew that the dog was dangerous and had departed from the peaceable habit of its species." On page 386 of the same work he further says: "Provided that there exists the necessary knowledge of danger, in accordance with the rule which we have considered in the preceding section, he who keeps an animal is absolutely responsible

for its acts. He is bound at his peril to prevent it from going at large or in any other manner having an opportunity of exercising its mischievous instincts. If any harm is done by it, he is liable (unless there exists some specific ground of exemption) without any allegation or proof of negligence in the custody or care of the animal. This rule of absolute liability was established in the year 1846 by the Court of Queen's Bench in *May v. Burdett*. . . ."

With respect it is submitted that Mr Salmond has approached the question of the common law or absolute liability (scil. the so-called rule in *May v. Burdett*) from the wrong standpoint. The view here taken is that liability depends on the knowledge of the quality of the animal rather than the quality of the act committed by it. The question whether a particular act is a vicious or mischievous act¹ in the case of an ordinarily harmless animal is, of course, pertinent, as such an act is the occasion of liability; but the cause or ground of liability is the known dangerous quality or propensity of the animal.

The so-called rule in *May v. Burdett* has nothing whatsoever to do with liability for acts natural to a domestic or harmless animal. If there be any responsibility for such acts it can only be because they are the direct consequences of trespass or negligence.

In the case of *Clinton v. J. Lyons & Company* ([1912] 3 K.B. 198) the plaintiff, who was carrying a pet dog, entered, by permission of defendants, one of their tea-shops. On the premises was a cat which

¹ Surely he uses these terms in a different sense from that in which they are ordinarily employed.

had kittens. The cat had been shut up in a store-room but got out, and when plaintiff put her dog on the floor the cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband who was with her. The cat then sprang on her shoulder and bit her arm. In an action for damages for the injuries to the plaintiff and to her dog, it was held, as far as the injuries to the dog were concerned, that the act of the cat was one natural to its species, and that therefore the defendants were not liable.

In the course of his judgment, with which on this point Ridley J. expressly agreed, Bray J. said: "It remains to consider whether there was any evidence to support the claim for damages for injuries to her dog. Now it is certainly the common experience of mankind that cat and dog will fight whether the cat has kittens or not, but it would be ridiculous to hold that for that reason every person who keeps a dog or a cat does so at his peril and is responsible for any damage his cat will do to his neighbour's dog or his dog will do to his neighbour's cat. There is no case to be found in the books showing such a liability." ([1912], 81 L.J. (K.B.) at p. 931¹.)

The instance which Mr Salmond gives of the ordinary acts of a person's domestic animals for which he holds that their owner is responsible under the

¹ Supposing the cat (or a dog) had even been a trespasser, and, whilst trespassing, had committed such an injury as that in the case just cited, presumably its owner would not have been responsible. But this would have been owing to the special rule affecting the trespass of dogs (and possibly cats) which was noticed ante, pp. 33-36, and certainly would not affect the general rule which is contended for here.

so-called rule in *May v. Burdett*—namely, the natural tendency of cattle to stray and trespass, and eat and tread down crops—is an indication that he takes a different view from that expressed here as to what is now the true ground of the common law liability. At pp. 388–389 he considers the origin of the absolute liability for cattle-trespass—which is said to have given rise to the rule in *Rylands v. Fletcher*; and the origin of the absolute liability for injury by animals—which gave rise to the rule in *May v. Burdett*; and he shows that they proceeded from entirely unconnected principles, being independent growths from different roots. And yet he gives as an illustration of the latter an instance which is not covered by it, but obviously belongs to the former. He also examines the logical relation which exists between the two rules at the present day, and concludes that they largely overlap each other, if they do not actually coincide. “It seems probable,” he says, “that there is no case in which a person can be liable under *Rylands v. Fletcher*, for damage done by an animal in which he will not be equally liable under the more comprehensive rule in *May v. Burdett*.” It is submitted, however, that this view cannot be maintained. For the reasons already mentioned it seems that all cases of harm resulting from acts which it is within the ordinary nature of a domestic or harmless animal to commit are instances where the owner of such an animal would be liable under *Rylands v. Fletcher*, but not under the rule in *May v. Burdett*. If such harm were the ordinary consequence of trespass or negligence it would be remediable in an action for damages; otherwise not.

The rule in *May v. Burdett* cannot therefore be said to be more comprehensive than the rule in *Rylands v. Fletcher*.

Extracts have already been quoted from the judgment of Lord Esher M.R. in *Filburn's* case which show that the law assumes that certain animals are not of a ferocious or dangerous disposition. These may be divided into two groups, viz. (a) those which are harmless by nature, e.g. rabbits, hares, partridges, pheasants and the like; (b) those which are recognised by the law as not being dangerous in England. They are rendered harmless by being domesticated for generations, e.g. horses and cattle. To make the owner liable for acts committed by such animals, if the acts are of a vicious or mischievous kind, knowledge of the propensity of the animal must be strictly proved. This rule has come down to us from the very earliest cases and has maintained its integrity in the common law in spite of criticism from without and deprecation from within. It has required the force of the Legislature to interfere with it, and even then the interference is partial and by way of exception merely, the result being that an added prominence is given to the general rule.

1 *Dyer* 2 *b*, pl. 162. "The master of a dog which has killed sheep is not punishable unless he knew it to be mischievous. Note, that in evidence to an inquest it was agreed by Fitzherbert and Shelley, That if a man have a dog which has killed sheep, the master of the dog being ignorant of the quality and property of the dog, the master shall not be punished for that killing; otherwise is it if he have notice of the quality

of the dog." In this case one "William Morgan, Knight, impleaded John Cronet for chasing his pigs and sheep with dogs at Sambro', and for the biting of the said dogs, so that the said sheep died; the jurors said that the aforesaid John was not guilty, nor did command his servants, nor was it done by his command but as for the biting of one of the sheep, of the price of five shillings and eightpence, his servants did this; and the jurors, being demanded whether the aforesaid dogs were accustomed thus to bite without any instigation, said positively that they were not; wherefore let the plaintiff take nothing by his writ, and let John go thereof without day."

So in *Buxendin v. Sharp* (2 Salk. 662)¹ "the plaintiff declared that the defendant kept a bull which used to run at men; but did not say *sciens* or *scienter* etc. This was held naught after a verdict; for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration." A case of *Bayntine v. Sharp* (1 Lutw. 33) seems to be almost identical with the foregoing. "Case, against the defendant for keeping a mad bull, which wounded the plaintiff. He had a verdict but the judgment was arrested because it was not alleged that the defendant did know the bull to be mad." The following note is added: "It doth not appear when this case was adjudged nor in what Court, neither is there any Book cited in it." In the case of *Mason v. Keeling* ([1700], 1 Ld Raym. 606) the declaration stated that defendant "*Quendam canem*

¹ See also *Buxentine v. Sharp* (3 Salk. 12).

molossum, Anglice a mongril mastiff, valde ferocem custodivit et retinuit et canem illum in communi platea vocata Water Street ore ejusdem canis adtunc minime ligato existente, Anglice not musled, libere et ad largum ire permisit idem canis pro defectu debitae curae et custodiae ipsius the defendant ipsum the plaintiff per communem plateam apud etc circa legitima negotia sua transeuntem furiose et violenter impetivit, et ipsum the plaintiff adtunc et ibidem graviter momordit et vulneravit, et suram, Anglice the calf, cruris sinistri ipsius the plaintiff graviter momordit et vulneravit, etc.” Defendant’s counsel took exception to the declaration “that the plaintiff has not shown that the defendant knew that this dog was valde ferox; without which knowledge he shall not be answerable for any injury, that he of a sudden and unknown to the defendant, did to the plaintiff.” For plaintiff it was urged “that though in such actions as this here, it has been held necessary in many cases to say *sciens* in the declaration; yet where the fact has such circumstances as this hath, the omitting of *sciens* will not vitiate the declaration. For in this case the dog is shown to be valde ferox; and then to permit such a dog to go at large in the highway is a common nuisance; and then whosoever receives any particular prejudice or damage shall have an action.” And per Holt C.J. and Turton J. “the declaration is ill for want of showing that the defendant had notice, that the dog was fierce. . . . Now for anything that appears to the contrary, the owner might not have had this dog but one day or two before and did not know of this fierce nature; and then the dog, because the door was left open, ran out

and bit the plaintiff; it will be very hard to subject this defendant the owner to an action for it. Otherwise if the defendant had known before that this dog was of such a fierce nature, for he ought to have kept him in at his peril.... But Gould J. was of opinion that the declaration was good; because the averring, that the dog was fierce, made the owner liable to an action for an injury done by such dog, because he did not keep him in a safe place." Sed adjournatur. And afterwards the parties agreed between themselves and no judgment was given¹.

The case is important upon another ground, to which notice has already been drawn in a previous section, Holt C.J. having given utterance to certain propositions the meaning of which in this connection is far from clear. He is reported to have said: "There is a great difference between horses and oxen, in which a man has a valuable property and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality."

Willes J. in *Cox v. Burbidge* ([1863], 13 C.B. (N.S.) 430) thought that the expression "a valuable property" had reference to the passage to be found in the Institutes iv. Tit. 9, "*Denique si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit,*" and he gives reasons why that could not apply to dogs. Willes J.

¹ In 12 Mod. 336, the Court is represented to have given judgment for the defendant.

thought that perhaps control was meant by Lord Holt and not property. However that may be, "the dictum exhausts itself on the liability of the owners of horses and oxen for trespasses committed by them on land, pursuing their ordinary instincts in search of food." The dictum cannot affect the liability for injuries by domestic or harmless animals, for Lord Holt goes on to put the very case of a horse as one where the owner is not liable unless he knows of the vice. "But in the former case if the owner puts a horse or an ox to grass in his field, which is adjoining to the highway and the horse or the ox breaks the hedge, and runs into the highway and kicks or gores some passenger, an action will not lie against the owner: otherwise if he had notice, that they had done such a thing before."

For a clear contrast between the rules of liability in the case of a dangerous animal and in the case of a harmless animal the reader is again referred to the extracts from the case of *R. v. Huggins* (ante, p. 57).

Presumably the earliest instance where the distinction was taken between acts which are, and acts which are not, within the ordinary nature of the animal, occurs in the case of *Jenkins v. Turner* ([1696], 2 Salk. 662). "The plaintiff declared that the defendant kept a boar *ad mordend. animalia consuet.*, and knew of this habit and that the boar did bite etc. This was held good after verdict, though it was objected that these animals may be frogs or mice etc. for we must intend there was proof of biting such animals as will support the action, otherwise the judge and jury would not have concurred in this verdict whereby the plaintiff recovers damages; And as to another

objection, viz. that the defendant cannot know what animals he is to defend against; it was answered, that no evidence can be given of killing any animals but what he has knowledge of."

In another report of the same case, Powell J. is represented to have said: "There may be a difference between a boar and a dog; for it is the nature of a dog to kill animals which are *ferae naturae* as hares, cats etc.; but it is not natural to a boar to kill anything; and therefore in the case of a dog there might have been a question whether the word *animalia* had been good in the declaration, because it might have been intended of some such animals as they naturally bite and kill. But since a boar does not naturally kill any it shall be intended as before is said." (1 *Ld Raym.* 110.) Though this case was not cited by counsel in *Clinton v. Lyons* (*ante*, p. 70), yet the Court there adopted a similar view, namely that it is not a vicious or mischievous act for a dog to injure a cat, or vice versa. Such an act is one within the ordinary nature of such an animal to commit, and, apart from trespass or negligence, involves no liability.

In an action upon the case, reported in *Cro. Car.* 254, for keeping a mastiff "*sciens* that he was '*assuetus ad mordendum porcos*' and that the plaintiff was possessed of a sow great with pigs and that the said mastiff bit the said sow so as she died of the biting," it was moved in arrest of judgment that the declaration was bad "for it is proper for a dog to hunt hogs out of the ground; and his biting of the hogs is necessary, and not like to the keeping of a dog which usually bites sheep or other cattle. But the Court, *absente Richardson*, conceived

the action well lies; for it is not lawful to keep dogs to bite and kill swine. Wherefore it was adjudged for the plaintiff."

The following cases are illustrative of what, in modern law, are considered to be mischievous or vicious acts, that is to say, acts of harm which it is not within the ordinary nature of the particular animal to commit. To make the owner of the animal liable for the harm received the scienter must be proved by evidence the degree and sufficiency of which will be indicated in subsequent pages.

In an action for injury caused by a vicious bull, it appeared that the plaintiff, with a boy, was driving a cow "in a particular state" past a field in which the bull was kept when the bull crossed the intervening ditch and approached the cow. Plaintiff struck the bull which threw him down and injured him. Notice had been given to defendant of the bull's having run at a man previously and the scienter was otherwise sufficiently proved. Chief Justice Best, in his summing up, said to the jury: "If you are satisfied upon the whole, that the injury occurred from the vicious nature of the bull, which the defendant knew, then you will find your verdict for the plaintiff." (*Blackman v. Simmons* [1827], 3 Car. & P. 138.)

Similarly, it is a vicious act on the part of a ram to butt a person, and the scienter is therefore an essential to liability. (*Jackson v. Smithson* [1846], 15 M. & W. 563.) But after proof of scienter the animal is in the same category with regard to injuries as is an animal dangerous by nature. Mr Baron Alderson recognised this in this very case. "In truth there is no dis-

inction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one which is *ferae naturae*."

It is not the ordinary habit of a horse to kick a child on a highway. This is "a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse," and the owner is not responsible for such an act in the absence of proof of scienter. (*Cox v. Burbidge* [1863], 32 L.J. (C.P.) 89.)

The scienter is also an essential in an action for damages for the destruction of game by dogs. (*Read v. Edwards* [1864], 17 C.B. (N.S.) 245.) The law with regard to the destruction or injury of cattle by dogs has been modified by statute and will be considered in detail at a later place.

An animal which infects other animals with disease is in the same position as an animal which does any other kind of injury, and therefore knowledge of its character for harm is to be proved in order to establish liability. In an action for "wrongfully, negligently and improperly" keeping sheep diseased with the scab and dangerous to be at large, defendant "well knowing that the said sheep were so diseased," etc., whereby the sheep became intermixed with plaintiff's healthy sheep and infected them with disease, proof of scienter is essential to the support of the action. (*Cooke v. Waring* [1863], 9 T.L.R. 257.) The Court also held in this case that there can be no negligence in a matter of this sort if there was no knowledge on defendant's part, at the time of the supposed negligence in keeping them, that the sheep were then diseased;

and in the absence of evidence of such knowledge that a nonsuit was rightly directed. (See also *Earp v. Faulkner* [1875], 34 L.T. (N.S.) 284.)

It is to be noted that the requirement of scienter exists in the law of tort only. A person who enters into a contract to take due care in respect of the person or property of another is liable, in case he has omitted to take such care, for damage caused by the acts of dangerous animals, and this independently of any proof of scienter. Thus in *Smith v. Cook* ([1875], 1 Q.B.D. 79) the defendant, an agister of cattle, had received a horse from the plaintiff to be taken care of for reward. He placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, the shallow ditch between the two closes not being sufficient to keep it out. There was no evidence that the bull was of a mischievous disposition. The horse was found dead, apparently having been gored by the bull. In an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff. A rule nisi having been obtained on the ground that there was no evidence of scienter and that such evidence was necessary to maintain the action, the rule was discharged by the Court on the ground that knowledge of the mischievous disposition of the bull was not essential to liability under the contract of agistment. Blackburn J. said: "The question is: Does this principle (i.e. the principle requiring proof of scienter) oblige us to hold as a matter of law that it cannot be negligence on the part of an agister of horses to assume that bulls and cows

are likely to be quiet, and to put a horse among them? I think that this proposition is a non sequitur upon the law as to mischievous animals. I do not say that the defendant's act would in all cases necessarily be negligence, but it is a question of fact whether he took sufficient care or not, and the doctrine of scienter which, I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care."

In the treatment of the principles set forth at the head of this part of this work liability for injury by harmless animals has been said to attach to the person who "keeps" the animal, i.e. has possession or control of it. This person may or may not be the owner.

In an old case it was established that any person who harbours the animal or habitually allows it to have access to his premises may be liable as for "keeping" it. "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty either to have destroyed the dog or to have sent him away, as soon as he found that he was mischievous." (*McKone v. Wood* [1831], 5 Car. & P. 1.)¹ It is to be noted that in the foregoing case the defendant *alone* had control of the dog, to the exclusion of the owner, and his liability has been explained on that ground. Presumably the owner

¹ Lord Tenterden C.J., from whose judgment this extract is quoted, apparently had no doubt that the keeping a dog in such circumstances was a wrongful act.

would not have been held liable if the action had been brought against him.

In the recent case of *North v. Wood* ([1914], 83 L.J. (K.B.) 587) defendant's daughter, who was seventeen years old and lived with her father assisting him in his business and receiving a weekly wage for so doing, owned a bull terrier which was kept at defendant's house. The dog licence was in the daughter's name, and she paid for it and for the dog's food out of her own money. Whilst the plaintiff was leading her Pomeranian dog past defendant's shop the bull terrier attacked and killed the other dog. Both the defendant and his daughter knew that the bull terrier had previously bitten two Pomeranian dogs. In an action for damages it was held that defendant's daughter had arrived at years of discretion and was able to control the bull terrier and that in fact she had the control of it, and that therefore the defendant who was not the owner was not liable. On appeal the decision was affirmed by the Divisional Court, the opinion being expressed at the same time that if the daughter had not been competent to control the animal the defendant would have been the person liable.

The question as to who "keeps" or has the control of the animal is therefore one of fact. But in a case of ambiguous control it seems as if "control follows ownership."

But if the animal has strayed on to one's premises and there causes injury, no liability ensues if nothing has been done to encourage its presence, or at any rate if reasonable care has been used to prevent its continued access to the premises. The question

resolves itself into whether the person sought to be made responsible has taken reasonable care to render his premises safe for those persons who may lawfully resort to them. (*Smith v. Great Eastern Railway Co.* [1866], L.R. 2 C.P. 4.) In this case the plaintiff had been bitten by a stray dog whilst at defendants' railway station waiting for a train. It was proved that at 9 p.m. the same evening the dog had attacked another person on the platform and had torn her dress and that the attention of the Railway Company's employees had been called to the matter; that an hour and a half later the dog had attacked a cat in the signal-box, near the station, and the porter had then kicked the dog out and that nothing more was seen of it until it attacked the plaintiff at 11.30 p.m. On these facts it was held that there was no evidence to warrant a jury in finding that the Railway Company had been guilty of negligence. "It is not enough to show that the damage may have occurred through the negligence of the defendants' servants—even coupled with the suggestion that no sufficient explanation was given of the dog's conduct. The plaintiff must show something which the defendants might have done, and which they omitted to do, before they can be held responsible for the misfortune which has happened to her." (*Willes J.* at p. 10.)

3. (1) In proving the scienter it is essential to establish knowledge of a propensity or disposition of the particular animal to commit an act of the kind which effects the injury or causes the damage complained of.

(2) Evidence of scienter must tend to establish knowledge of the particular propensity or disposition to which the vicious or mischievous act is referable. Thus in the case of a dog biting a human being it must be shown that the animal was "accustomed to bite mankind" and that the owner knew this.

It has already been stated that scienter is the owner's knowledge of a propensity or disposition of the animal to commit an act of the kind which effects the injury or causes the damage complained of. It is not a simple matter to gather any general principles from the consideration of the cases bearing on this point. At most it may be laid down that the evidence must tend to establish the particular propensity from which the vicious or mischievous act flows, e.g. a propensity to chase and kill game.

In the case of injury to human beings it is sufficient to show that the animal has once, to the owner's knowledge, previously committed a like injury. If a person keeps a dog after notice that it has once bitten a man, an action will lie against him at the suit of a person who is subsequently bitten by the dog. (*Smith v. Pelah*, 2 Str. 1264.) And so the Chief Justice here ruled "though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not to be endangered¹."

¹ Evidently he also was of opinion that the mere keeping of such a dog was a wrongful act.

More modern cases have shown that, even though it be proved that the animal has bitten a person previously to the owner's knowledge, it is, nevertheless, a question for the jury to decide whether the dog was a ferocious one or not, and if so, whether the defendant knew it. The propensity is not inferred from the previous bite as a matter of law. The circumstances of the case must be considered and evidence of provocation of the animal will be received. (*Charlwood v. Grieg* [1850], 3 Car. & K. 46.)

Is it necessary to go so far as this, however; is it necessary to show an actual injury such as a previous bite, or will evidence falling short of this suffice?

The Courts have held over and over again that knowledge of an actual injury need not be shown. Then the question arises, What facts must be shown to have been within the owner's knowledge? This can be answered only by considering the circumstances of each case. The quantum of evidence necessary to show that the animal is possessed of a ferocious or mischievous disposition has differed at the different stages of the law's development, and with a fine disregard of principle.

The two matters are so closely allied that it seems almost impossible to consider what is evidence of knowledge apart from what evidence is necessary to establish the propensity. In *Mason v. Keeling* (ante, p. 33) the majority of the Court held that it was insufficient to aver simply that the dog was "valde ferox."

Knowledge of something is essential. The question appears to be whether the animal had a previous mischievous or vicious propensity directed to the kind

of harm inflicted, and whether the defendant knew of it. It is a question for the Court to decide whether there is evidence in law to go to the jury, and it is for the jury to decide upon the facts presented. In an action on the case the declaration of which charged the defendant with knowingly keeping a fierce and savage dog without being properly secured, by which the plaintiff's child was bit and torn and in consequence thereof died *per quod servitium amisit*, Lord Kenyon C.J. allowed evidence to go to the jury of a common report that defendant's dog had previously been bitten by a mad dog. The defendant's dog had been tied up in a cellar belonging to him, but the rope or chain by which it was fastened was of such a length that it permitted the dog to go as far as the curb-stone on the opposite side of the street. The dog broke through a little wicker gate into the street and injured the plaintiff's child. It was carried to the salt water, but after its return was seized with hydrophobia and died. His lordship said: "Such a case as this I believe never appeared before, but I am clearly of opinion the action is maintainable. Report had said the dog had been bitten by a mad dog; it became the duty of the defendant to be very circumspect; whether the dog was mad or not was matter of suspicion; but it is not sufficient to say, 'I did use a certain precaution.' He ought to use such as would put it out of the animal's power to do hurt; here too the defendant showed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad, by the precaution he used to tie him up; that precaution has not been sufficient; and for want of it

the injury complained of has happened. I am clearly of opinion the plaintiff is entitled to recover." (Jones v. Perry [1796], 2 Esp. 482.)

In contrast with the foregoing is the case of Beck v. Dyson ([1815], 4 Camp. 198) nineteen years later. Case, for keeping a dog which bit the plaintiff. It was proved that the dog was of a fierce and savage disposition, that the defendant generally kept it tied up, and that the plaintiff, having been bitten by the dog, was promised a pecuniary recompense by the defendant; but there was no proof of the dog's having bitten any person previously. Lord Ellenborough held the evidence insufficient to warrant the jury in inferring that the dog was accustomed to bite within the knowledge of defendant, and directed a nonsuit.

In Judge v. Cox ([1816], 1 Starkie 285) the declaration in case averred the keeping a dog which the defendant knew to be accustomed to bite mankind and which severely bit the plaintiff's leg. It was proved that defendant was well aware of the dog's savage disposition, and in consequence had warned one of the witnesses to take care of the dog lest he should be bitten. Evidence was also given that subsequently to the injury complained of, the dog had bitten a child, but we are not told in the report whether this fact was put to the jury. Upon general principles such evidence ought not to have been admitted. Abbott J. after commenting on the fact that the defendant had expressed a warning to the witness to take care of the dog, left it to the jury to say whether they were satisfied that the dog had, before the time of the

injury, bitten some human being, and that the defendant knew it. A verdict was given for the plaintiff.

Hartley v. Harriman ([1818], 1 B. & Ald. 620) comes next in point of date and the case is a more complicated one owing to defective pleading. The Court of Queen's Bench (Lord Ellenborough C.J., Bayley, Abbott and Holroyd J.J.) there decided that evidence of dogs being of a ferocious and mischievous disposition and accustomed to attack men did not support an averment that they were accustomed to "hunt, chase, bite, worry and kill sheep and lambs." Evidence was given that the dogs had previously attacked men, and in one instance, that a voice had been heard from defendant's premises calling them off, and that they had on previous occasions run after sheep. But there was no proof that they had ever bitten or worried any sheep before the event which gave rise to the action. Lord Ellenborough ruled that the plaintiff had put himself out of court by the allegation in the declaration of the particular habits of the dogs and of the defendant's knowledge of those habits; and he went on to say: "He might perhaps have stated his ground of action more generally by alleging that these dogs were of a ferocious nature and unsafe to be left at large; and there is evidence sufficient to show that the knowledge which the defendant had of these dogs ought to have imposed on him the duty of tying them up." Bayley J. said: "The declaration might have been framed more generally, and might have stated that these were dogs of a ferocious and mischievous disposition, and then there might have been evidence to support it. But

here it is stated that they were accustomed to bite sheep and lambs. And there is no evidence of that fact." The rule for a new trial was made absolute. Apart from the decision in this particular instance, it is difficult to see why a declaration in a case of injury to animals should have been sufficient when framed generally, whilst in the case of injury to mankind it should have required to be framed specially. But in any event this case does not affect the general principle which is contended for here, namely, that the evidence must be directed towards the particular mischievous propensity which is the cause of the harm received. As far as the form of the declaration is concerned, the dictum of Powell J. in *Jenkins v. Turner* (ante, p. 82) might be cited "that if a man has a dog which bites sheep, and the man has notice of it and keeps the dog, and afterwards it bites a mare, an action lies, but the declaration must be special."

The case of *Hartley v. Harriman* was considered in *Gething v. Morgan* (*The Law Times*, Vol. 29, p. 106, [1857]), another case of sheep-worrying. It was there proved that four years before the occurrence of the injury complained of, the same dogs had, to defendant's knowledge, bitten a child eight years old, who was passing through defendant's fold in the daytime. The Court of Queen's Bench affirmed a judgment for the plaintiff, Lord Campbell C.J. adopting the dictum of Bayley J. that it would be enough to allege that the dogs were of a ferocious disposition to the knowledge of the owner, and holding that there was sufficient evidence to support that allegation. And per Crompton J.: "I agree that

the question is whether there was such evidence that a jury could fairly act upon, in finding for the plaintiff; and I think there was. In ordinary cases one previous act of ferocity is enough to put the owner on his guard; and if he afterwards permits his dogs, with knowledge of their vicious disposition, to run about, with tickets of leave as it were, he must be responsible for any further damage which they may do."

Although in English law an attack upon human beings can be given in evidence where it is necessary to prove a vicious disposition giving rise to an attack upon animals, and a propensity to attack animals of one species may be proved in support of an allegation of an attack on animals of another species, yet evidence of attacking or biting an animal is not evidence of a disposition to attack and bite mankind. (*Osborne v. Chocqueel* [1896], 2 Q.B. 109.) Here a dog had previously bitten a goat, to the knowledge of the defendant, and Lord Russell of Killowen C.J. and Wills J. held that in order to establish a cause of action it must be shown that defendant knew that the dog had a ferocious propensity directed against mankind. A finding that the dog was ferocious, based upon the fact of the attack on the goat, is insufficient. From the remarks of the judges on the argument of this case it is evident that they agreed with the principle contained in the rules set forth at the head of this section.

In *Thomas v. Morgan* ([1835], 2 C.M. & R. 496) the question was whether there was evidence to go to the jury of a scienter, where, on being informed that his

dogs had bitten the plaintiff's cattle, defendant offered to settle for the damage done if it could be proved that his dogs had caused it. The question had previously arisen in almost similar terms in the case of *Beck v. Dyson* (ante, p. 93), where Lord Ellenborough refused to leave the evidence to the jury. It was proved in *Thomas v. Morgan* that the dogs had worried the cattle of other persons and were of a ferocious disposition. A witness also deposed that two or three days after the injury complained of the defendant's dogs had also worried his cattle, and that when complaint was made by witness, defendant said he could not help it, and that he had ordered his dogs to be kept up. This evidence was rejected by the Court on motion for leave to enter a verdict for the plaintiff who had been nonsuited. The Court held that proof that the dogs were of a savage disposition, and had bitten the cattle of other persons, was not evidence that the defendant *knew* that they were accustomed to bite cattle, but on the other hand that the evidence of the offer of compromise should have been left to the jury as some slight evidence of scienter, but should have been left to them with a strong observation in favour of the defendant. The rule was discharged on the ground that the evidence ought to have little or no weight with the jury, as the offer might have been made from motives of charity without any admission of liability at all.

Statements made by the owner of the animal at the time of or subsequently to the injury complained of have been held to be evidence to go to the jury of the scienter. (Cf. *Judge v. Cox*, ante, p. 93.)

In the case of *Hudson v. Roberts* ([1851], 6 Exch. 697) a person wearing a red handkerchief was walking in the public street and was attacked and injured by a bull which was being driven along with some cows belonging to the defendant. The defendant was proved to have said after the accident that the red handkerchief was the cause of it, for he knew that the bull would run at anything red. Another witness deposed that on a different occasion the defendant said he knew that a bull would run at anything red. Pollock C.B. delivered the judgment of the Court of Exchequer upon a motion to enter a nonsuit. The Court thought that either of the defendant's expressions was some evidence to go to the jury that he knew the animal was a dangerous one, and discharged the rule accordingly. The question arose in the case whether there was the same duty in regard to the keeping of the animal where the evidence went towards showing that the animal was ferocious only to a special class of mankind, namely, to those who are met with carrying a red handkerchief or wearing red garments. The Court, however, was not inclined to draw any such distinction between classes of persons: "As the circumstance of persons carrying red handkerchiefs is not uncommon, and it is reasonable to expect that in every public street persons so dressed may not unfrequently be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing as he did the knowledge that, if it met a person with a red garment, it was likely to run at and injure him."

This case was relied upon in the recent case of *Clinton v. Lyons* (ante, p. 75), where it was contended that a cat must be accounted "*ferae naturae*" because it is vicious towards such of mankind as are carrying dogs. But Ridley J. said: "I think that a bull which is vicious to persons wearing a red tie may well attack a person without one. But the hostility of cat and dog, on the other hand, has passed into a proverb, and I am not disposed to say that if a cat attacks a dog, and by accident a person who happens to be there, the cat is therefore dangerous to mankind." ([1912], 81 L.J. (K.B.) at p. 926.)

The cases which turn upon the amount of evidence necessary to establish the vicious propensity and which are not concerned so much with the question of knowledge are numerous, and a few only of such cases may be cited here.

In an action for knowingly keeping a fierce and mischievous dog which had bitten or wounded the plaintiff, it is necessary to prove the injury to the plaintiff and that the dog was fierce and mischievous and known to be so by the plaintiff. A habit merely of bounding upon persons in play and seizing them, not so as to cause hurt or injury, though causing some annoyance and trivial accidental damage to clothes, is insufficient to sustain the action. (*Line v. Taylor* [1862], 3 F. & F. 731.) In this case Erle C.J. allowed the dog to be brought into court in charge of his keeper. The dog was afterwards liberated and the jury inspected him at close quarters. In his summing up the Chief Justice said that they might form an opinion as to the disposition of the animal in question partly from their

knowledge of dogs and from their observance of the animal when produced for inspection¹.

Where a dog was shown to have exhibited a ferocious disposition by invariably rushing out of his kennel when any stranger passed and by jumping up as far as his chain would allow him, barking and trying to bite, this was held sufficient even in the absence of evidence that the animal had bitten any person before the doing of the injury which was the subject-matter of the action. One of the tenants of the yard in which the dog was kept, who spoke to the savage disposition of the animal, also said he had complained to defendants about it and told them that the dog should be more closely secured; but on cross-examination he would not say whether this was before or after the injury had been inflicted upon the plaintiff. The defendants admitted that the dog was purchased for the protection of their premises. The Court held there was evidence to go to the jury that the animal possessed a ferocious disposition towards mankind and that the defendants were aware of the fact. (*Worth v. Gilling* [1866], L.R. 2 C.P. 1.) The allegation that the animal was accustomed to bite mankind was added *at nisi prius* by way of amendment to the declaration.

It now seems to be well-settled law that to establish liability it is not necessary to show that the animal has, to the knowledge of its owner, actually committed or attempted to commit an act of harm of the kind

¹ The reporter adds a note on the importance of the case as throwing some light upon the provisions of the Common Law Procedure Act 1854, sec. 58, with regard to the inspection by the jury or witnesses of property material to the determination of the question in dispute.

which is the subject-matter of the action. It is sufficient to prove that the animal had a propensity to commit such an act, and that its owner knew this. A modern instance of the facts requisite to support the alleged vicious propensity of the animal occurs in the case of *Barnes v. Lucille* ([1907], 96 L.T. 680). A bitch, which at the time had three pups, had made frequent efforts to enter a workroom in which the plaintiff, an apprentice milliner, was employed by the owners of the animal. The occupants of the workroom were in considerable fear of the defendants' dogs getting in, and ultimately the bitch did get in and bit the plaintiff. The defendants' manager admitted in evidence that the dogs were of uncertain temper; and in correspondence passing previously to the commencement of the action he pointed out that the fact that the bitch had pups at the time of the accident might be the reason why the animal attacked the plaintiff. The judge held that there was no sufficient evidence of any previous biting, but that it was sufficient to find, as he did find, that the defendants knew the dog had a propensity to bite people, and that defendants took no precaution to prevent it getting into the room. He also referred to the evidence that since the accident such precautions had been taken, and he held this to be material as showing that the defendants knew precautions ought to be taken.

On appeal the Divisional Court held that there was evidence upon which the judge might come to the conclusion at which he had arrived. *Darling J.* there said: "It is a misapprehension on the part of many people to suppose that in order to make the owner of

a dog liable the dog must have actually bitten someone before. Nor do I think it necessary to show that the dog has attempted to bite somebody....What is necessary is that there should be evidence that the dog is a ferocious dog, which means that he would be likely to bite without provocation. There are many dogs which will bite other animals which are perfectly harmless with human beings. I do not think, further, that in order to make the owner of a dog liable that the dog must be always and invariably ferocious. If the owner knows that at certain periods the dog is ferocious, then he has knowledge that at those times the dog is of such a character that he ought to take care of it. If a man knows that a bitch which is ordinarily amiable is ferocious when she has pups, and people go near her, I think he has knowledge that at such times she is of a ferocious character, and in these circumstances he ought to shut her up and prevent her getting at people while she is ferocious, although the ferocity of the dog's character is intermittent."

A somewhat similar case of injury arose in *Clinton v. Lyons* (ante, p. 75), where a cat, which had kitted, bit and injured a dog and its owner who was carrying it at the time. It was held in that case that there was no sufficient evidence to prove that a cat with kittens is likely to do mischief to such a person. The judgments in the case are far from clear. The term "*ferae naturae*" is used to denote a dangerous animal, and it is assumed that an animal becomes 'dangerous,' so as to be the subject of the absolute duty, only when it is dangerous to mankind. This confusion lies at the root of both the judgments delivered. The actual

decision in the case on the points raised can be supported by reference to the principles laid down in previous pages of this work. But it is difficult to understand the reasons given.

4. (1) By statute, the owner of a dog is liable in damages for injury done to any cattle by that dog; and it is not necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner.

(2) Where any such injury has been done by a dog, the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog and is liable for the injury unless he proves that he was not the owner of the dog at that time: provided that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the house or premises in which the dog has been kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog.

(3) If the damages claimed under the above rules do not exceed five pounds they may be recovered under the Summary Jurisdiction Acts as a civil debt.

(4) In the above rules the expression "cattle" includes horses, mules, asses, sheep, goats and swine.

Cases have already been cited in which it appears that it is a vicious or mischievous act for a dog to attack and injure sheep, cattle, horses and other animals. But by the Dogs Act 1906 ([6 Edw. VII c. 32] repealing and re-enacting with some alterations the Dogs Act 1865 [28 & 29 Vict. c. 60]) a beneficial alteration of the law is made. The substance of the provisions of the present Act, as far as they are material to this work, are set out in the principles at the head of this section. Under the Act the principle of absolute liability is adopted, all that need be proved being the ownership and the injury.

In *Lewis v. Jones* ([1884], 49 J.P. 198) a case brought under the provisions of the earlier Act, appellant's dog was seen with another dog on a Welsh mountain in the act of worrying two lambs. The same day the shepherd found near the place four lambs dead, and the next day ten more. On the hearing of a case stated by justices the Court held that the evidence was sufficient to enable the justices to draw the inference that the dog had been concerned in the killing of the lambs subsequently found dead and justified them in ordering the appellant to pay part of the value of the whole loss.

In *Campbell v. Wilkinson* ([1909] 43 I.L.T. 237) the plaintiff was driving home two foals along the public road past defendant's farm when a young dog belonging to defendant rushed out of his house and barked at the foals. The foals broke away from the plaintiff's brother, who was in charge of them, and were not recovered until the next day. Both foals subsequently died from injuries received during the night. It was held that this was not an 'injury' within section 1 of the Dogs Act 1906. From this case it seems also that the Act does not exclude the defence of contributory negligence.

The fact that plaintiff's cattle were trespassing on defendant's land at the time of the injury is no defence to the action. (*Grange v. Silcock* [1897], 13 T.L.R. 565.) This was a case on section 1 of the Act of 1865, but the same principle, it is conceived, would apply to the present Act. Mr Justice Collins there said that the words of the statute were absolute. There was no express exception in favour of a dog which caught sheep trespassing. Nevertheless he thought it would be possible to conceive cases which would render it necessary to read some qualification into the words of the section. Thus if a wild bull escaped into a man's field and a dog used for driving it out bit the bull, it might be allowable. Words of this sort might then have to be deemed to be introduced into the section unless some legal justification for employing the dog be shown. But that question did not arise in the case he had to consider; the dog could not be in a better position than its master; he had no right to kill trespassers but only to use such violence as was

necessary to remove them. The dog was not assisting his master, and therefore the case fell within the absolute words of the statute.

The second rule above stated practically reproduces sub-section 2 of the first section of the Act of 1906. This sub-section is not so wide as the corresponding section of the earlier Act. There, the person sought to be made responsible could escape liability only by proving that he was not the owner at the time of the injury "and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge."

The effect of sub-section 2 of the Act of 1906 is most obscure. Supposing the occupier discharges the burden of proof cast upon him, who is responsible for the injury? Mr Salmond (*Torts*, p. 394) suggests several alternative answers to this question and indicates the problems which arise thereon. The question would form an excellent subject for debate.

The fourth rule reproduces section 7 of the Act. The earlier Act applied only to sheep and cattle, but in the case of *Wright v. Pearson* ([1869], L.R. 4 Q.B. 582) the term "cattle" was construed as including horses.

To the above remarks on the statutory provisions it may be added (although this is somewhat outside the purview of this treatise) that by section 1 (4) where a dog is proved to have injured cattle or chased sheep, it may be dealt with under section 2 of the Dogs Act 1871 as a "dangerous dog"; that is to say, a Court of Summary Jurisdiction may order that it be kept under proper control or destroyed, the penalty for non-

compliance with such order being a fine not exceeding twenty shillings for every day during which such non-compliance continues. The order for destruction may be made in the first instance without giving the owner the option of keeping the dog under proper control. Again, by section 2 the Board of Agriculture and Fisheries is empowered to make orders under the Diseases of Animals Act 1894, section 22, with a view to the prevention of worrying of cattle, for preventing dogs or any class of dogs from straying during all or any of the hours between sunset and sunrise, which orders may provide that any dog in respect of which an offence is being committed against the orders may be seized and treated as a 'stray dog.'

5. Knowledge of a servant or agent is knowledge of the owner of the animal if the latter has delegated to his servant or agent either:

- (1) the carrying on of his business; or
- (2) the control of the animal which caused the injury.

Knowledge of the vicious or mischievous propensity of the animal may be brought home to the owner through the medium of an agent. Actual notice to the agent is essential. But the evidence of this may be such as would be sufficient in law in the case of the owner himself.

It is not sufficient to show that *any* person in the employment of the owner has a knowledge of the dangerous propensity of the animal. In *Stiles v.*

Cardiff Steam Navigation Co. ([1864], 33 L.J. (Q.B.) 310) the defendants were a company, and the evidence adduced to prove the scienter was that on some former occasion some of the servants of the defendants had heard, and one of them had seen, the animal (in this case also, a dog) spring upon and bite someone else, but those servants had no control over the affairs of the defendant Company or over the dog; and this was held to be insufficient to charge the defendants. Crompton J. there said: "I quite agree that the knowledge of a servant representing his masters and acting within the scope of their delegated authority may be competent to affect his masters with that knowledge. But is it found in this case that any such persons had knowledge, persons competent to bind the defendants by their admissions?...for such evidence is in the nature of an admission. No doubt there must be some such person; for there must have been someone on the premises to control the business of the defendants. It would have been sufficient to show knowledge in the manager or some person having the control of the yard. I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it; but perhaps it would be enough if he had the care of the dog. But all that is found is that some persons who appear rather to have had the care of horses had seen or had heard that the dog had bitten a person before. It is more like the case of a gardener or a cook hearing that their mistress's lap-dog was given to bite; and I think that the evidence wholly fails to bring home the knowledge to any person

whose knowledge in point of law would be that of the defendants.”

In an action for damages for an injury caused by the bite of a dog, a witness deposed that information that the dog had bitten another person had been given to the defendant's wife four years previously. She, being called as a witness, denied ever having received any notice of the kind. Defendant's wife was accustomed to assist her husband in his business of a milkman. The Court held that the evidence was slight but sufficient evidence of scienter to be submitted to a jury. The complaint of the previous injury upon which the scienter was based had been made on the premises to the wife, had the character of a message, and was delivered to the first person who seemed to have authority to receive such a message. (*Gladman v. Johnson* [1867], 15 L.T. (N.S.) 476.) In the case of *Miller v. Kimbray* ([1867], 16 L.T. (N.S.) 360) a doubt was expressed at nisi prius whether the converse would hold good, i.e. whether notice to a husband, simpliciter, would render his wife liable. The facts of the case were as follows: The plaintiff had attended at defendant's house to pay her rent and was attacked and bitten by defendant's dog as she was passing through the defendant's yard. A witness stated that he had been bitten by the same dog some years previously and that he had brought an action in consequence; that that was during the lifetime of defendant's husband (who at the time the present action was brought had been dead for some considerable time) and that the witness's complaint had been made to the husband. Mellor J. did not think that a notice to the husband

should be taken to be a notice to the wife, as a man might be told many things that he never communicated to his wife. After consulting the other judges his lordship said he would leave it to the jury to say whether, under all the circumstances, they thought that the defendant knew, or must have known, that the dog was of a fierce and savage nature. A verdict was given for the plaintiff.

Presumably the action mentioned as having been brought by the witness in this case was brought against the defendant's husband; though of course it might have been brought against husband and wife together. Even in the former case the very fact of the action having been brought against the husband would seem to be evidence of knowledge on the part of the wife sufficient at least to have been left to the jury. There could hardly be any dispute as to her knowledge in the latter case. On the other hand, if the action had been brought against the husband alone, it may have been brought against him as owner of the dog, and a notice to him as owner should not, unless actually communicated, adversely affect a person who became owner subsequently. (Cf. *Mason v. Keeling*, ante, p. 80.) No question of delegated authority seems to have arisen in this case.

Apparently notice to defendant's infant son (aged eleven) is sufficient to fix the defendant with the scienter. (*Elliott v. Longden* [1901], 17 T.L.R. 648.) But note that the action in this case was brought under the provisions of section 1 of the Dogs Act 1865.

The question of constructive knowledge was discussed at great length in the case of *Applebee v. Percy*

([1874], L.R. 9 C.P. 647), another case of dog bite. Here, two witnesses proved that they had been attacked by the animal on previous occasions and had gone to the defendant's public-house and made complaint to two persons who were behind the bar serving customers. There was no evidence that these complaints had been communicated to the defendant; nor was it shown that either of the two men spoken to had the general management of the defendant's business or had the care of the dog. It was held by Lord Coleridge C.J. and Keating J. (Brett J. diss.) that there was evidence of scienter to go to the jury. The view of Brett J. differed from that of the majority of the Court upon the ground that the barmen, to whom complaint of the previous injuries had been made, had no duty in relation to defendant's business other than that of serving customers and of receiving the price fixed by their master. They were not persons who stood in the place of their master and to whom the general control of the business was delegated in the master's absence. "To say that the knowledge of a wife or a servant is the knowledge of the husband or the master, irrespectively of the particular position or duties of the party in relation to the husband's or the master's business, would, in my judgment, be to uproot all one's notions of commercial dealings and to dispense altogether with the scienter in cases of this sort." Keating J. was of opinion, on the authority of *Gladman v. Johnson* (ante, p. 109), that the notice had been given to persons carrying on the defendant's business on his premises so far as it could be carried on by them alone, that the persons in question had authority to receive

it, that under such circumstances it was their duty to communicate it to their master and that it was not too much to conclude, as a matter of fact, that they did so communicate it. Lord Coleridge delivered a judgment to the same effect and pointed out that it was not a question of the weight of evidence but whether such evidence was given. "The matter may, I think, be put in either of two ways. In the first place, it may be said that the persons to whom the notice was given were in the position of managers of the defendant's business; not managers in the strict and full sense suggested by my Brother Brett, but, as in *Gladman v. Johnson*, persons interested, in the absence of their employer, with the conduct of his business; and that a notice to them of the vicious and ferocious nature of a dog kept about the premises where the business was so managed or conducted by them was, upon principle and upon authority, evidence fit to be submitted to the jury of a notice to their employer. Or it may be put upon another ground, viz. that suggested in *Stiles v. Cardiff Steam Navigation Co.* (ante, p. 108) and *Baldwin v. Casella* ([1872], L.R. 7 Exch. 325), that where a certain business or the performance of a certain duty is deputed to a servant, a notice to the servant so acting is a notice to the master, because he has placed the servant in his stead to represent him quoad that particular business or duty. . . . It seems to me that there was evidence in this case upon which the jury ought to have been asked whether they thought the persons to whom the notice was given were persons who stood in such a relation to the defendant as to make it their duty to communicate it

to him. It appears to me that all the ingredients for forming a judgment in that case exist here, and that the persons to whom the notice was given might reasonably be presumed to have had authority to receive such notice and to have made it their duty to convey it to the defendant and that they did in fact do so."

In *Baldwin v. Casella*, cited in the last case, the dog by which the plaintiff was bitten was kept in a stable of the defendant's situated in a mews, and was under the care and control of the defendant's coachman, who lived there. There was evidence which satisfied the jury that the dog had some time previously knocked down the plaintiff and scratched him and that this was known to the coachman. To prove the vicious temper of the animal evidence was given that on two previous occasions it had attacked persons passing through the mews, but this was not known either to the defendant or his coachman. The injury to the plaintiff also was not known to the defendant, who supposed the dog to be harmless, and allowed it to play with his own children. Mr Baron Cleasby directed the jury that if the coachman knew of the previous attack by the dog, his knowledge was the knowledge of his master, and that the defendant was liable. The jury found a verdict for the plaintiff. Upon motion for a new trial on the ground of misdirection, the Court of Exchequer approved the ruling. Martin B. said: "I think the direction of the learned judge was right. The dog was kept in the defendant's stable and the defendant's coachman was appointed to keep it; the coachman knew that the dog was

mischievous, and it is immaterial whether he communicated the fact to his master or not; his knowledge was the knowledge of his master." The judgment of Bramwell B. rested upon wider grounds. "It appears to be the rule of law, that the possibility of loss and injury arising to others from things which are likely to be dangerous raises, on the part of those who have them under their control, a duty to inform themselves about them.... So all dogs may be mischievous; and therefore a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint someone under whose observation and inspection it may be. The defendant has appointed his coachman to that duty; the coachman knew of the mischievous propensities of the dog; and his knowledge is the knowledge of the master."

According to the view of the learned judge it would seem that the mere fact of keeping a dog may be held to involve a duty of using due care to ascertain whether it has, or even is likely to have, a mischievous or vicious nature.

The fact that a domestic servant who was employed by the defendant had seen or had heard that the dog had bitten a person before, is not sufficient to fix the defendant with constructive notice, if the servant had not control of the animal. Thus in *Colget v. Norrish* ([1886], 2 T.L.R. 471) an attempt to fix the defendant with a constructive knowledge failed under the following circumstances: A postman was delivering letters at defendant's house and when the front door was opened defendant's collie dog flew at the postman and bit his leg. In the action for damages which the plaintiff

brought in the County Court there was evidence that complaints of the ferocity of the dog had been made to defendant's domestic servant. Upon this the County Court Judge found that although these complaints were not communicated to the defendant or his wife, the communications to the servant were sufficient evidence of scienter in the defendant, as it was the servant's duty to tell her master of them. On appeal to the Divisional Court a difference of opinion occurred, Mathew J. thinking that there should be a new trial, and A. L. Smith J. holding that judgment should be given for the defendant. A. L. Smith J. withdrew his judgment, and the order for a new trial stood, the defendants having leave to appeal. The Court of Appeal allowed the appeal and ordered judgment to be entered for the defendant on the ground that the County Court Judge had found as a fact that no complaints had reached defendant as to the dog having bitten anyone or as to its being ferocious. And per Lopes L.J. notice to the domestic servant could not be said to be notice to the master.

At first sight it may seem difficult to distinguish this case from *Baldwin v. Casella*. But there the actual care and control of the dog had been delegated to the coachman, which was not the case here. Again, in this case it was expressly found as a fact that defendant had no notice.

In *Cleverton v. Uffernel* ([1887], 3 T.L.R. 509) an action was brought to recover damages for injuries sustained by the plaintiff who had been bitten by defendant's dog whilst in the bar of the defendant's public-house. At the trial the jury found in answer

to three questions put to them (1) that the dog was dangerous to mankind, (2) that the defendant did not know it, and (3) that one Russell, defendant's brother-in-law, and employed as defendant's potman, did know it. The second answer was directed by the learned judge (Denman J.), who held that there was no evidence against the defendant that he personally knew the dog's disposition; but on the whole findings his lordship left the plaintiff to move for judgment. On cross motions for judgment and for a new trial the Court (Day and Wills J.J.) ordered a new trial on the ground of misdirection, Mr Justice Day observing that the learned judge was wrong in directing the jury to find for the defendant on the question whether he had knowledge, and that the first question was whether Russell had charge of the dog so that his knowledge would be constructive knowledge in the defendant.

6. The general conditions of liability being present, it is immaterial (subject to the exceptions hereafter mentioned) whether the act of harm complained of causes injury to the person or damage to property (including other animals), or whether it is committed on the premises where the animal is kept, or on the premises of the plaintiff, or on the highway or elsewhere.

Wherever the general conditions of liability which have been laid down in previous pages are fulfilled, and there is no specific ground of defence, the absolute duty arises irrespective of the object of the injury or

the place where it is committed. There is no need to enter into a detailed illustration of this. Sufficient instances have already been given to show that the nature or character of the object of the harm does not affect liability.

With regard to the place of the injury, in *Filburn's* case the harm was received on defendant's premises, in *Read v. Edwards* on the plaintiff's land, and in *Cox v. Burbidge* on the highway.

It is to be noted that although a person may be liable for acts of harm committed by his animals whilst they are trespassers, those acts may or may not be natural to the animal to commit. In the latter case there may be alternative remedies. If the harm received be within the rules as to remoteness of damage, the owner may be liable in trespass. If the scienter be proved, the owner is subject to the absolute liability. On these points the reader is referred to page 38 et seq.

7. The absolute liability for harm caused by animals is excluded in the following circumstances:

(a) where the injury was caused by vis major or the act of God. *Sed quaere*.

(b) where the immediate cause of the injury complained of was the act of a third person.

(c) where the plaintiff suffers by his own default or brings the injury upon himself; or where he, knowing of the risk of harm, voluntarily undertakes it. *Volenti non fit injuria*.

(d) where the plaintiff, at the time of the injury complained of, was trespassing upon the premises where the animal was kept.

It remains to consider whether there are any exceptions to the rule of strict responsibility for injury caused by ferocious or mischievous animals or by harmless or domestic animals which are known to have vicious or mischievous propensities.

If reference be made to the principle underlying the cases of which *Rylands v. Fletcher* is the generalisation, the principle to which the present subject is so often (and, it is submitted, wrongly) referred, it will be found that there are at least two or three well-defined exceptions to liability which might, at first sight, have application here. Thus the rule in *Rylands v. Fletcher* has been decided by the Court of Appeal not to apply to damage of which the immediate cause is the act of God, that is to say, to damage which is the result of some natural occurrence which could not reasonably be foreseen or anticipated. Whether the damage falls into this category is a question of fact. (*Nichols v. Marsland* [1875], L.R. 10 Exch. 255.)

Again, the general principle has no application where the immediate cause of damage is the act of a stranger—(*Box v. Jubb* [1879], 4 Exch. Div. 76)—or where the injured person brings the injury upon himself.

Do these, or other similar exceptions, apply to the liability for wrongs committed by animals? Apparently exceptions to the liability do in fact exist. In *May v. Burdett* (ante, p. 58) Lord Denman C.J. said:

“Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it.” If it is a *prima facie* liability, exceptions must exist. What are those exceptions?

In a later part of his judgment in the same case, Lord Denman suggests one possible exception: “It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance: but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.” It is proposed to defer the consideration of this suggested exception until later.

Vis major or the act of God would seem to be no excuse, but the question is doubtful. That it was no excuse was evidently the opinion of the Court of Exchequer expressed in the judgment of the Court delivered by Bramwell B. in *Nichols v. Marsland* (*supra*). It was there held that a man who stores water on his own land and who uses all reasonable care to keep it safely is not liable to be sued for an escape of the water which injures his neighbour, if the escape be caused by an agency beyond his control. But the judgment distinguished the case from the case of the keeping of a wild or savage animal, and Bramwell B. went on to say: “I am by no means sure if a man kept a tiger, and lightning broke his chain, and he got loose

and did mischief, that the man who kept him would not be liable." If this is the true view of the law, then a wrong resulting from the keeping of such an animal affords an instance, and possibly the only instance in the law of tort, where not even *vis major* is an excuse. The matter was also incidentally considered in the Court of Appeal in the case of *Baker v. Snell* ([1908] 2 K.B. 825), where the dictum of Bramwell B. was cited with approval by Cozens-Hardy M.R.

Secondly, does the fact that the injury was brought about by the intervening voluntary act of a third person afford an exception to the rules of liability? This was the main question which arose for solution in the case of *Baker v. Snell* (*supra*). In that case, the defendant, a publican, kept on his premises a dog which he knew to be a savage animal. He usually kept the dog chained up during the day, but his barman had instructions to let it out for a run each morning and to bring it back and tie it up before the other servants came downstairs. One morning the barman brought the dog back while the plaintiff and another barmaid were at breakfast. He brought it into the kitchen and said: "I bet the dog won't bite anyone," and added, "Go it, Bob"; whereupon the dog bit the plaintiff. Upon these facts the County Court Judge nonsuited the plaintiff on the ground that this was a wilful and malicious act on the part of the barman and was an assault by him. The Divisional Court (Channell and Sutton J.J.) set aside the judgment and ordered a new trial of the action. Channell J., after quoting the dictum of Bramwell B. (*ante*, p. 119), expressed the opinion that although it goes some way

to solving the question whether or not the liability of the owner extends to rendering him liable for injury done by a dog owing to the voluntary act of a third person, yet he did not think that it could extend to making the owner liable for the act of a third person for whom the owner is in no way responsible; and he went on to put the following case: "Suppose a dog is placed in a house to protect the premises, and a thief comes in; there can be no doubt that if he were bitten by the dog he would have no cause of action. (This is the exception dealt with in the fourth place.) But suppose the thief were followed by a policeman, and the thief released the dog and set it at the policeman, and the dog bit him, I do not think that the policeman would have any cause of action against the owner of the dog, because the injury would be due to the act of a third person for whose conduct the owner was in no sense liable. But in the present case the person to whose act the injury was due was the servant of the defendant and the person to whom in point of fact he had entrusted the dog." ([1908], 77 L.J. (K.B.) 727.) He went on to hold that there was evidence from which a jury might infer that the act of the servant was done in neglect of his duty as custodian of the dog, and that his master was therefore liable. He thought, too, that it might be that, if the facts had been left to a jury, the jury would have found that the dog bit the plaintiff by reason of its savage disposition, and not in consequence of any inducement by the barman.

Mr Salmond in dealing with the "very unsatisfactory case of *Baker v. Snell*" (at page 392 of his

treatise on the law of torts) suggests that the case might have been decided in favour of the defendant on the ground of the doctrine of common employment. That doctrine is at bottom an application of the principle expressed in the maxim "*volenti non fit injuria*," but it is difficult to see how that principle could have been applied in this case. The risk of injury from the dog could not be said to be a risk incidental to the service. (Cf. *Mansfield v. Baddeley* [1876], 34 L.T. 696.)

Mr Justice Sutton was of opinion that, as the gist of such an action is the keeping of the animal after knowledge of its vicious propensity, the owner was liable for any injury caused by the animal in all circumstances, except where a plaintiff by his own conduct had brought the injury upon himself.

The Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.J.J.) held that the case ought to have been left to the jury and that there must be a new trial. But whilst the Master of the Rolls and Lord Justice Farwell thought that the defendant was responsible notwithstanding the intervening voluntary act of a third person, Lord Justice Kennedy held that the *prima facie* liability of the owner in such case does not extend to injury brought about by such intervening act, at any rate if the act be one of a criminal nature. The judgments are worthy of a careful perusal, as they all three differ in detail as a result of a different conception of the nature of the liability. It is preferred here to adopt the judgment of the Master of the Rolls as being the most sound exposition of the law.

After stating and illustrating the absolute duty to prevent harm resulting from the keeping of an animal whose nature is ferocious or of an animal of a class not generally ferocious but which is known by the owner to be dangerous in fact, the learned judge adverted to the case of *Nichols v. Marsland* and quoted Mr Baron Bramwell's dictum, already cited, as going to show that the act of God or vis major is no excuse. He then proceeded to say: "That case came before the Court of Appeal, where Lord Justice Mellish delivered the judgment of the Court. He said: 'The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act.' If it is true, as I think it is, that it is a wrongful act to keep an animal which is known to be dangerous, that is an authority, not merely of the Court of Exchequer, but also of the Court of Appeal, that the person so keeping it is liable for the consequences of his wrongful act, even though the immediate cause of damage is the act of a third party." ([1908], 77 L.J. (K.B.) 1093.) The question has

already been considered as to whether the keeping an animal which is known to be dangerous is in itself a wrongful act¹.

In the course of his judgment in this case Farwell L.J. in terms laid down that the act of keeping the animal is a wrongful act and involves liability for the consequences under whatever circumstances arising. But he qualified his proposition almost immediately: "The wrong is in keeping the fierce beast; and the person who chooses to keep it is responsible for the injury arising from his own wrongful act, unless the injury was due to the plaintiff's own default or (possibly) to vis major or the act of God: these are the only exceptions, as appears from Lord Blackburn's judgment in *Fletcher v. Rylands*, and it is to these that he refers when, just before, he speaks of the prima facie liability of the defendant."

It is submitted that the judgment of Lord Blackburn (then Blackburn J.) is no authority for saying that vis major or the act of God is an exception to the liability of the person who keeps such an animal.

The judgment of the Court of Exchequer Chamber in *Fletcher v. Rylands* was quoted by Lord Cairns with approval when the same case came before the House of Lords. The terms of the judgment have already been noticed (see pages 48 and 49), and it has been seen that although they may be an excellent exposition of the law as to the escape and trespass of cattle or domestic or ordinarily harmless animals, they have nothing to do with injuries by dangerous animals, or

¹ The reader is referred to page 66 et seq., where authorities on both sides are quoted.

by animals known to have dangerous proclivities. Be that as it may, attention need be directed only to the fact that we are now dealing—and the case of *Baker v. Snell* deals—not with the escape and trespass of animals, but with the case of harm caused by the actual keeping of animals. It was never alleged in that case, or in *May v. Burdett*, or in *Jackson v. Smithson*, or in many other similar cases, that the harm was caused by the animal's escape or trespass: it was caused while the owner *kept* the animal, i.e. while he had the actual control of it, and the judgments were all based on that fact, and that was held to be sufficient to found the action. The truth is, as was premised earlier in this treatise, that the cases of injury by animals, apart from trespass, belong to a wider field of responsibility than that of which the principles are generalised in *Rylands v. Fletcher*. Hence, what may be exceptions to the rule in *Rylands v. Fletcher* cannot, on that account, be held to be exceptions to the rule of absolute liability for harm resulting from the keeping of animals.

There appears little to be said concerning the decision of Kennedy L.J. He draws the inference from the case of *Jackson v. Smithson* (ante, p. 84) that there is nothing wrongful in the act of keeping a dangerous animal. He also refers to the introduction of the terms "*prima facie* liability" in the judgment of Lord Denman in *May v. Burdett* and draws the inference that liability does not extend to damage directly brought about by the intervening voluntary act of a third person. *Sed non sequitur*, and Lord Denman himself in the next following

passage of his judgment indicated the exception he had in mind.

Now comes the consideration of the third suggested exception, namely, where the plaintiff suffers by his own default, or brings the injury upon himself, or as Lord Denman puts it, where "the injury was solely occasioned by the wilfulness of the plaintiff after warning."

The defence is practically the equivalent of Contributory Negligence, but that term is not used here, as it assumes to some extent that the wrong to the plaintiff is based on negligence, which, of course, it is not.

Where defendant, who was the owner of some zebras, had kept his animals securely fastened up in a stable, he was held, by the unanimous judgment of the Court of Appeal, not liable in an action for damages brought by a person who had gone into the stable to stroke one of the animals, and whilst doing so had received injury. Lord Justice A. L. Smith in the course of his judgment there said it was conceded that a zebra was a dangerous animal, and that by law a man who kept a dangerous animal must do so at his peril, and that if any damage resulted, then, apart from any question of negligence, he was liable for the damage. But that was subject to this—that the person who complained of damage must not have brought the injury on himself. Where the plaintiff did something which he had no business to do—e.g. by meddling, as the plaintiff in this case had done—then the defendant was not liable. After quoting the remarks by Lord Esher in *Filburn's* case on this point, his Lordship

went on to say that the action could not be maintained on the common law liability. The plaintiff then set up a claim for negligence, viz. that the door was not kept locked, and that there was no keeper at hand. The evidence showed that the door had been shut, but had got opened. If the plaintiff had been kicked while walking along the stable an action might have lain, but the plaintiff went into the stall and meddled with the animal. Even if the fact of the door being open was an invitation to go into the stable, it was not an invitation to stroke the animals. In his opinion there was no evidence to go to the jury and judgment must be entered for the defendant. (*Marlor v. Ball* [1900], 16 T.L.R. 239.)

In a recent Scottish case it was held that it is not contributory negligence to pat a strange dog in the street, the dog happening to be a vicious dog and biting the plaintiff. (*Gordon v. Mackenzie* [1912], 2 Scots Law Times, p. 334.) "The public are entitled to expect that a dog that is allowed to wander about a street unattended is not a dangerous dog; and I cannot hold that a person who, when a dog approaches him, pats it or puts out his hand to pat it, either from friendliness or it may be in order to conciliate it, is guilty of contributory negligence" (The Lord Justice-Clerk at p. 335). (Cf. *Smith v. Pelah*, 2 Str. 1264.) A case which is similar to the foregoing arises where a person, knowing of the risk of harm from the animal, voluntarily undertakes it. This exception from liability is usually shortly referred to by the maxim 'volenti non fit injuria.'

In *Mansfield v. Baddeley* ([1876] 34 L.T. 696)

defendant was a dressmaker and the plaintiff a workwoman in her employ. The defendant kept a dog which was in her house when plaintiff took the situation. It was admitted on both sides that the dog was a savage brute, and the plaintiff was aware of its disposition. The plaintiff went one day into the kitchen, at the request of the defendant, when the dog, which was generally tied up, rushed from under the table and bit her leg. At the trial of an action for damages for the injury the case was left to the jury, who found for the plaintiff. Subsequently the judge directed a nonsuit on the point of law raised at the trial that the plaintiff was a servant and knew that the dog was a savage dog and that the action could not be maintained. On the argument of a rule to set aside the ruling of the judge, the Court (Cleasby B. and Grove J.) gave judgment for the plaintiff, on the ground that she could not be said to have taken the risk of harm upon herself when she knew the dog was generally tied up, and she went downstairs believing that it was so tied up. But Cleasby B. said: "If the plaintiff, knowing that the dog was of a savage disposition, had gone of his (sic) own accord to the place where the dog was about loose, with a knowledge that it was there, in that case I should hold that she took the chance of the dog being in a humour to bite her, and could not recover." Similarly, Grove J.: "It is said that the plaintiff knew of this dog when she entered the service of the defendant. No doubt she cannot recover for risks incidental to the service. I think that this risk is not incidental to the service, nor do I see anything in the conduct of the plaintiff which would disentitle her

to recover. If the plaintiff when she entered her employment knew the character of the dog, and that in the ordinary course of her employment she would have to go by the place where it was tied up, it might perhaps be said she took the risk. But here she was asked to do something which was no part of her service, in fact a mere good-natured act, it being something ultra her service to go to the kitchen. The dog then rushes out and bites her. Such a risk was not incidental to the service, nor one which by her conduct she has undertaken to bear."

Turning to the fourth exception mentioned above, the case of the harm occurring to a trespasser, in an old case, *Brock v. Copeland* ([1794] 1 Esp. 203), where action was brought to recover for the bite of a dog, it was ruled that if the dog were kept on defendant's premises and the injury received in consequence of the plaintiff imprudently going there, the action cannot be maintained. The defendant was a carpenter, and the dog was kept for the protection of his yard; the dog was tied up during the day (and was then very quiet and gentle) but was let loose at night. The plaintiff, who acted as defendant's foreman, went into the yard after it had been shut up for the night, and the dog bit and injured him. A nonsuit was entered. Lord Kenyon, in the course of his remarks, said that every man had a right to keep a dog for the protection of his yard or house and that the injury which an action of this nature was calculated to redress was, where the animal, known to be mischievous, was permitted to go at large, and the injury arose from the not securing the animal so as not to endanger or injure the public; that

here the dog had been properly let loose and the injury had arisen from the plaintiff's own fault in incautiously going into defendant's yard after it had been shut up. The report then goes on to say: "His lordship added that in a former case, where in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence, that the plaintiff was crossing a field of the defendant's where the bull was kept and where he had received the injury, the defendant's counsel contended, that the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie; but that it appearing also in evidence, that there was a contest concerning a right of way over this field, wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the Court of King's Bench had concurred in opinion with him, that the plaintiff having gone into the field, supposing that he had a right to go there, as over a legal way, that he should not then be allowed to set up in his defence, the right of keeping such an animal there as in his own close, but that the action was maintainable."

In *Sarch v. Blackburn* ([1830], 4 Car. & P. 297) the plaintiff brought an action for damages for injury received from the bite of a dog under the following circumstances: The defendant carried on the business of a milkman, and his sons that of a cow-keeper. Defendant's dog was in a yard near some outbuildings and was attached to its kennel by a chain about four yards long. Over the kennel, nailed against the

palings, was a board, on which was painted in letters three inches in length "Beware of the dog." The plaintiff was unable to read. There were three entrances to the premises, two of which were more private than the third and a person passing along either of these might have occasion to approach the dog. A witness proved that he had been bitten by the dog previously and that this was known to defendant. He admitted on cross-examination that the accident occurred to him as he was passing along one of the private ways through which he thought he had no business to go. Chief Justice Tindal, in his remarks to the jury, said: "You must show that the dog was accustomed to bite, and that the defendant knew it, before you can throw upon him the responsibility of keeping it from doing so. If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act. . . . Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. . I think he has no right to place a dog so near to the door of his house that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it. As to the notice, it does not appear to me that a painted notice is sufficient, unless

the party is in such a situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read."

Exception may be taken to the statements of Lord Kenyon and Tindal C.J. that a person has a right to keep a fierce dog for the protection of his premises. Perhaps what is meant is, that a person against whom the premises require protection—a person who wrongfully enters upon those premises—cannot be heard to complain that the keeping of such an animal is a wrongful act. It would seem that this is sufficiently shown from the words of the former when he says that the action lies where the injury arose from the not securing the animal so as not to endanger or injure the public. (It is submitted that there is nothing inconsistent here with the fact that an absolute duty is prescribed and not a duty of using care merely.) That Tindal C.J. means the same seems to be shown from the opening words of his statement, and by his test of inquiring whether, in the particular place, the means adopted by the defendant for securing the animal were sufficient, i.e. sufficient not to endanger or injure the public. It is not a question of degree, but a question of fact one way or the other. Unless some such explanation as this be accepted, then the dicta of the two judges must be taken as being inconsistent with and overruled by the decisions in the more recent cases. The manner in which the law distinguishes between a trespasser and a person coming upon premises on lawful business has been stated as

follows: "While, if a dog is known to be vicious, its owner is under an obligation to keep it in proper restraint, yet knowledge that it is a vicious dog does not impose an obligation on the owner's friends and acquaintances to stay away from his premises, and they are merely bound to exercise a reasonable amount of precaution. The owner is excepted from liability where the person injured was a trespasser, or where the dog was kept in the owner's own premises during the night to protect them.... But on the other hand, it is no ground of defence that the dog was kept in premises during the day if it was kept in such a position that it could attack a person who calls at the premises on lawful business, whether of the owner or of the visitor." (21 Ir. Law Times 53.)

It is proposed to defer consideration of the position of persons who are injured by animals whilst they are on the premises of the owner of the animals by his invitation or as licensees. It seems preferable to treat of these matters in connection with the duty of a person who occupies premises which are rendered dangerous by reason of the keeping of dangerous animals thereon.

8. (1) The person who has kept a dangerous animal probably remains responsible for acts of harm committed by it even after it has escaped, provided it is one of a class which is not usually found at large in this country.

(2) If the animal is one of a class which usually enjoys a state of natural liberty in

this country, then, it is submitted, the responsibility ceases as soon as the animal has returned to its natural state *sine animo revertendi*.

The question of the duration of responsibility for the acts of a harmful animal is still a matter of conjecture. Upon principle, a person who keeps a tiger, a monkey or other animal which is not usually found at liberty in this country remains responsible after its escape for harm done by it at any time. The remarks of Lord Denman in *May v. Burdett* are wide enough to cover the case, and it would seem that the learned judge must have had it in contemplation at the time of delivering his judgment, for, in argument of that case, reference was made to a rule of the Civil law touching upon the matter. (Inst. iv. 9: "*Si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit.*") At any rate it is difficult to conceive any other rule than that above enunciated.

Where the animal is of a class usually found at large in this country it is suggested that the rule is different. If the animal escapes and regains its wild state, there is no good reason for holding its former keeper responsible for its acts in the future. The risk of harm from it is the same as from that of all members of its species which are at large and is a common danger which every person must incur. The temporary captivity of the animal has in no way affected the matter. A person who, for instance, lets a rat out of a trap, has not enhanced the common danger and should not therefore be responsible for the

future actions of the animal. "If one kept a tame fox which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him and he hath remained in his wild nature." (1 Ventr. 295. Opinion of Marsden J.) This opinion was doubted by Johnson J. in *Brady v. Warren*, though he gives no reasons. From the point of view of convenience, the second suggested rule is as necessary as the first.

SECTION II. *The duty to take care, and other obligations*

1. (1) A person who keeps an animal is liable for harm caused by it or through its instrumentality in any circumstances in which the law raises a duty of taking care in the control of the animal on the part of that person, and there has been a breach of that duty.

(2) Such person is liable for the natural and probable consequences of the breach of duty but not for an unexpected event.

It has been mentioned in a previous part of this treatise that the owner may be liable on the ground of negligence for harm committed through the instrumentality of the animal he owns. This liability may be altogether independent of (1) the strict responsibility for harm caused by the keeping of the animal, or (2) the absolute duty of preventing its trespass upon the lands of others.

The incidence of this duty of using due care and caution in practical affairs, is much more obvious in the case where the animal is under the actual personal control of the owner or his servant than in cases where there is no such physical control. A horse which is being ridden, a dog which is being led, cattle which are being driven, may, and often do cause harm which is directly and solely attributable to the absence of care on the part of the person riding, leading or driving. And these cases are so familiar to us, and so similar in principle, that little purpose is served in referring to more than a few instances.

Again, there are similar cases where the harm is more or less due to the nature or characteristics of the animal itself. For instance, horses or cattle in charge of a person on the highway may be known to be of uncertain temper or of a harmful disposition and likely to cause injury if special care to control them be not taken. In such cases a duty to use a proportionate amount of care and caution will arise; that is to say, an amount sufficient to guard against not only the ordinary risk of accident due to the act of the person having control of the animal, but also against the risk of harm caused by the spontaneous act of the animal itself. This must be a question of degree. Considerably more care must be used, for instance, in taking an unbroken horse through a crowded thoroughfare than in driving through such a place with a horse, which, though properly broken in, is a high-spirited animal. The points to be attended to in cases of this sort are first, the character of the animal, and secondly, the purposes for or the circumstances in which it was

used. In *Mitchell v. Alestre* ([1677], 2 Lev. 172) defendants took two "ungovernable" horses into Lincoln's Inn Fields, "a place where people are always going to and fro about their business," and "eux improvide incaute et absque debita consideratione ineptitudinis loci there drove them to make them tractable and fit them for a coach; and the horses, because of their ferocity, became not to be managed, ran upon the plaintiff and hurt and grievously wounded him." The defendants were held liable although no *scienter* was alleged and proved.

A further class of cases occurs where the animal does harm as a result of external causes over which the person in charge of it has no control, e.g. where a horse, frightened by escaping steam at a railway station, runs away. It is conceivable that a slightly different principle might be applied here, namely, as to whether it was negligence to bring the animal into such a place where it was known that ill effects might follow. Beyond noticing such matters as these, it is not intended to deal with them here.

Even in many of the cases of injury by the spontaneous act of animals which were considered under the heading of the absolute duty, the declarations in the actions contained an alternative allegation of negligence; and far from being valueless, the very presence of such allegations denoted their utility and efficacy. For, had the evidence which was to be adduced in support of the allegation of the stricter duty been deemed insufficient, the suitor might still have relied upon the allegation of negligence and possibly have succeeded. Indeed, in many cases of injury by

domestic or harmless animals, and particularly in the case of injury to cattle by dogs before the law received statutory amendment on this point, the difficulty of proving the scienter was so great that negligence was more often relied upon as the ground of liability. The two grounds may exist simultaneously upon the same facts, as is shown by the case of *Card v. Case* (ante, p. 69), and the reader is referred to the extracts from the judgments there quoted. It is sufficient to emphasise the fact that the Court has held in that, and in other similar cases, not that negligence is not a cause of action where the absolute duty is raised, but that the wrongful act of keeping the animal, with the other necessary elements, is a cause of action without the aid of the allegation of negligence.

The cases of negligence in the physical control of animals are illustrative of the general principles of liability in tort for negligence.

In *Hammack v. White* ([1862], 11 C.B. (N.S.) 588) action was brought under Lord Campbell's Act, 9 & 10 Vict. c. 93, by a widow to recover damages against the defendant for having by his negligence caused the death of her husband. The defendant had bought a horse at Tattersall's and the next day was trying it in Finsbury Circus when, from some unexplained cause, the horse became restive and, notwithstanding defendant's well-directed efforts to control it, ran upon the pavement and killed plaintiff's husband. The case was tried in the Lord Mayor's Court and resulted in a nonsuit, the Recorder being of opinion that there was nothing in the evidence to warrant a jury in finding that the defendant had been guilty of negligence.

The Court of Common Pleas subsequently refused to grant a new trial which was asked for on the ground of misdirection. Chief Justice Erle said: "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here, is either that the defendant was unskilful in the management of the horse or imprudent in taking a vicious animal, or one with whose propensities or temper he was not sufficiently acquainted, into a populous neighbourhood." After referring to the facts proved, his lordship continued: "I can see nothing in this evidence to show that the defendant was unskilful as a rider or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding so as to justify him in being with his horse at the place in question. . . . It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him." And per Williams J.: "It is said that *prima facie* the defendant was guilty of negligence because he was wrongfully on the foot-pavement. But the fact of his being on the foot-pavement is nothing unless he was there voluntarily; and, to say the least, it is quite as consistent with the facts proved that he was there involuntarily as that he was there by his own mismanagement. . . . Where the evidence given is equally consistent with the

existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury." If the horse had been entirely unmanageable to the knowledge of the defendant different considerations would have been applicable. The term 'scienter' would seem not to be properly used in such case, although Williams J. adopts it. (Cf. *Manzoni v. Douglas* [1880], L.R. 6 Q.B.D. 145.)

Attempts have at times been made to establish in similar cases, where the act is not wrongful, a liability in trespass, independently of negligence, upon the archaic principle that a person must answer for all the direct consequences of his voluntary acts. The early cases show a fair amount of authority for the existence of such a principle, though no decision goes to the length of actually adopting it. In every case the question will be found upon examination to resolve itself into one of pleading or the form of the action to be adopted. The decline of opinion towards the existence of the principle connotes the gradual recognition of the defence of inevitable accident¹. At the risk of a digression it is proposed to examine those of the cases which relate to animals.

An early case, *Gibbons v. Pepper* ([1695], 2 Salk. 638) is in point. "In trespass and assault, etc., the defendant pleaded that he was riding a horse in the King's Highway, and that the horse being frightened ran away with him, and that the plaintiff and others were called to, to go out of the way, and did not; and the horse ran upon the plaintiff against his will, etc.

¹ See Pollock's *Law of Torts*, 6th edn. pp. 131 to 146, for a full discussion of the matter.

The plaintiff demurred, and had judgment; not but if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence; but the reason of their judgment was, because the defendant justified a trespass, and does not confess it; for if A beats my horse, by which he runs on another, A is the trespasser, and the rider is not." The case clearly shows that the defendant was not even *prima facie* a trespasser. The matter of defence should have been raised on the general issue.

Wakeman v. Robinson ([1823], 1 Bing. 213) and *Hall v. Fearnley* ([1842], 3 Q.B. 919) raise the same point. In the former case the jury were directed that the action being one of trespass, if the injury were occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. They were not asked to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or whether it was wholly unavoidable, nor was any request made by defendant's counsel that this should be put to the jury. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained on the ground of misdirection but was subsequently discharged upon reasons fully stated in the judgment of Dallas C.J. "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the Court. The action was trespass, and the trespass was clearly made out against the defendant. It has been contended, indeed, that the defendant would not have

been liable under any form of action; but upon the facts of the case, if I had presided at the trial, I should have directed the jury that the plaintiff was entitled to a verdict, because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way."

An earlier case of *Leame v. Bray* ([1803], 3 East 593) cited in argument, was a case of collision between vehicles resulting in personal injury to the plaintiff. The report states that the accident happened owing to the defendant, on a dark night, driving his carriage on the wrong side of the road, and the parties not being able to see each other, "but it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was, therefore, objected for the defendant that, the injury having happened from negligence and not wilfully, the proper remedy was by an action on the case and not of trespass *vi et armis*. The plaintiff was thereupon nonsuited." On the argument of the rule to set aside the nonsuit, the discussion turned solely upon the question whether the injury was "immediate from defendant's act, or consequential only from it," and the result was that the nonsuit was set aside. But the report clearly shows that there was evidence upon which a jury might have inferred negligence, and defendant's counsel assumed it in the objection which was subsequently upheld. But if the judgments delivered are looked at, nothing will be found there to show that in the absence of negligence the Court would have held the defendant liable either in trespass or in case.

The point arose directly in *Holmes v. Mather* ([1875], L.R. 10 Exch. 261), a case of a runaway horse and carriage causing injury to a foot passenger. It was there contended that the act of the defendant's groom in directing the horses on to the plaintiff in trying to avoid running into a shop was an immediate act of violence, that defendant was answerable in trespass and that whether the injury was wilful or not was immaterial. The Court of Exchequer held that the action did not lie. Mr Baron Bramwell took the ground that for the convenience of mankind in carrying on the affairs of life, persons in the position of the plaintiff must expect or put up with such mischief as reasonable care on the part of others cannot avoid. He also maintained that the immediate act of the defendant's servant was not to direct the horses on to the plaintiff but rather to guide them away from her in another direction. "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough. If the act that does an injury is an act of force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable; though trespass would be the proper form of action if it were wrongful."

In a later case, *Stanley v. Powell* ([1891] 1 Q.B. 86), nearly all the authorities were reviewed and the Court decided in effect that in the absence of negligence, alleged and proved, an action is not maintainable for harm caused by unavoidable accident from another's lawful act.

Apart from the question of trespass, which may now be taken to have been finally disposed of, the ordinary principles of liability for negligence apply to animal cases, and therefore the complainant must prove affirmatively such facts as will, in the opinion of the Court, be capable in law of supporting the inference that the defendant has failed in the performance of a legal duty. In other words, there must be evidence of negligence before the province of the jury is entered.

In *Abbott v. Freeman* ([1876], 34 L.T. (N.S.) 544) defendant was the proprietor of a yard used for the sale of horses. Whilst the plaintiff was walking behind a row of spectators who were watching a horse then on sale, a servant of defendant led the horse by a halter down a lane formed by the spectators on one side and a blank wall on the other. There was no barrier between the spectators and the horse. When the horse was about ten yards from plaintiff, another servant of the defendant struck it with a whip to make it trot, whereupon the horse swerved into the crowd and injured the plaintiff. There was no evidence as to the nature of the blow given, nor as to the disposition of the animal, nor as to the manner of leading it, nor as to any custom of erecting barriers in sale yards such as that of defendant. On these facts the plaintiff was nonsuited. In the Exchequer Division a rule for a new trial was made absolute by a majority of the Court upon the ground that the case ought to have been left to the jury. The dissenting judgment of Pollock B. is to the point. After mentioning various facts which would have tended to show negligence on the part of defendant's servants if such facts had been

given in evidence, he says: "It was open to the plaintiff to give evidence of facts I have mentioned, or of excessive whipping or of negligent holding of the horse. None was given. If I had left this case to the jury I should in fact have left to them the result, and asked them to assume from its unusual nature that something unusual and improper caused it." The case came before the Court of Appeal who reversed the judgment of the Court below, being on the whole of opinion that there was no evidence upon which a jury might reasonably find negligence on the part of the defendant.

In *Jones v. Owen* ([1871], 24 L.T. (N.S.) 587) the plaintiff, whilst walking on the highway at about nine o'clock in the evening, was knocked down by two greyhounds which were coupled together. The plaintiff had no time to avoid the animals and, as it was nearly dark, did not see the coupling chain or rope until he fell over it. The defendant, who had been exercising the dogs which belonged to him, came up a few minutes later and ascertained that plaintiff's thigh was broken. Plaintiff did not in any way contribute to the accident. It was contended before the Court of Common Pleas that the award of the arbitrator (to whom all points in difference had been referred without pleadings) in favour of the plaintiff should be reversed on the ground that a *scienter* should have been proved. But the Court approved the finding of negligence on the part of the defendant although there was no evidence of *scienter*, Willes J. saying: "I agree that they (the greyhounds) are animals of an ordinarily quiet nature, and a person is not bound to exercise as much care with regard to them as he would be if he possessed

others of a nature known to be vicious. . . . This, however, is not a case in which we have to deal with the acts of dogs by themselves. Here the cause of the accident was partly an act of their master as well as of these dogs. . . . We have to deal here with dogs plus coupling chains, and I am not prepared to say that this was a proceeding on the defendant's part, which was not in point of law negligence."

Although there be affirmative proof of negligence, the action may still fail on the ground that the harm was too remote—that it was not the natural and probable consequence of the defendant's wrongful act. Thus in *Bradley v. Wallaces* ([1913], 82 L.J. (K.B.) 1074) it was held that where a horse, not known to be vicious, is negligently left unattended in a yard it is not a natural consequence of that negligence that it should kick a workman who happened to be passing it. Lord Justice Swinfen Eady said: "In the present case the negligence found by the County Court Judge is leaving the horse unattended. But no connection is shown between this and the accident. It was not even sought to be established that, if the head of the chain horse had been held at the time in question, or if the horse had not been unattended he would not have lashed out with his heels just the same when Bradley brushed by his tail. It was not attempted to be shown that it was the negligence which occasioned the mischief. The guiding principle is that a person is liable only for the natural and probable consequences occasioned by or resulting from trespass, or negligence; an injury suffered must be brought within this degree to give rise to a cause of action." (At p. 1080.)

As in the ordinary law of negligence, so in these animal cases the ordinary defences to an action for negligence may be raised. Thus the plaintiff may prove that the defendant has committed a breach of a legal duty, but the defendant may reply that the negligence of the plaintiff himself was the proximate cause of the injury. The negligence of the plaintiff, however, must, as in the case of the defendant, be a breach of a duty known to the law. In *Catchpole v. Munster* (reported in the *Law Journal County Courts Reporter*, December 6th, 1913) action was brought by the plaintiff, a farmer, against the defendant, a taxi-cab proprietor, to recover damages for injury to three sheep which had been run over by defendant's taxi-cab at night. The plaintiff's drover had charge of a hundred sheep. He was walking in front of the drove and his dog was following behind. The taxi-cab was travelling in the same direction, at a rapid pace and on the wrong side of the road. The County Court Judge nonsuited the plaintiff on the ground that the accident was due to his negligence in not carrying a light. On appeal, the Divisional Court (Bray and Lush J.J.) ordered a new trial on the ground that the judge was wrong in law in holding that a person who was driving sheep on a highroad without a light was guilty of negligence.

It has already been mentioned that the straying of animals from a highway, where they are being lawfully driven, is an exceptional case, apparently falling within the rules of trespass but properly being dealt with under the heading of negligence.

The rule of law is that, provided the animals were

lawfully upon the highway, their owner is not liable for their entry upon private property unless it happened through his negligence or the negligence of those for whom he is responsible.

In 2 Rolle's Abr. 565, pl. 7, referring to Y.B. 39 Edw. III, 3, it is said: "Si mon terre soit ouvert al haut chemin et les avers dun estranger enter sur le terre ceo nest justifiable." But against this we have the dictum of Catesby J. in Y.B. 22 Edw. IV, fo. 24: "If a man comes with a drove of cattle on the high road past where trees or corn or other crops are growing, then, should any of the beasts eat from these crops, the man who was driving them would have a good defence, provided the thing happened against his will. For the law understands that a man cannot control his cattle all the while. But if he permitted them, or if he let them continue, then it would be otherwise¹." The truth is that if such entry is entirely against the will of the person who has control over the animals, it is no trespass, or at least what is known as an involuntary trespass. "A man is driving goods through a town, and one of them goes into another man's house, and he follows him, trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily, and so it is injuria, and a hurt to another, and so it is damnum." (Doderidge J. in *Millen v. Fawtry*, ante, p. 51.) In *Goodwyn v. Cheveley* ([1859], 4 H. & N. 631) the plaintiff's cattle having, while being driven along a road, strayed into defendant's field through a gap in the fence, and the defendant having distrained upon them damage feasant, the

¹ Quoted from Kenny's *Select Cases on the Law of Torts*, p. 600.

Court of Exchequer held that the defendant was not justified, unless the plaintiff had had a reasonable time, under all the circumstances of the case, to remove his cattle. Bramwell B. dissented from the judgment of the majority, but only upon the question of reasonableness of time for the removal. He remarked that plaintiff "had a right to take his cattle along the highway; and when cattle are driven along a highway if there are no fences to the adjoining land it is certain that the cattle will stray. That is an unavoidable injury which persons whose lands border on a highway must sustain."

The reason put by the judges for the exception, if it may be called an exception, is given by Blackburn J. in delivering the judgment of the Exchequer Chamber in the case of *Fletcher v. Rylands*: "Traffic on the highways...cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger.... In" such "case, therefore, they" cannot "recover without proof of want of care or skill...." (L.R. 1 Ex. at p. 286.)

The authorities were considered in *Tillett v. Ward* ([1882], 10 Q.B.D. 17) and the same view of the law adopted. In that case defendant's ox while being lawfully driven through a street in Stamford, escaped without any negligence on the part of the defendant or his drover and entered the open door of an ironmonger's shop and there did damage to the extent of £1.

The judgment of the County Court Judge in favour of the plaintiff was reversed by the Divisional Court, and Lord Coleridge said: "It seems to me that an exception from the general rule of liability is clearly established where cattle, while being lawfully driven along a highway, trespass on premises immediately adjoining the highway." And per Mr Justice Stephen: "We have been invited to limit this exception to the case of highroads adjoining fields in the country; but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town."

It is noticeable that all the authorities agree in the point that the cattle should have been lawfully on the highway as a condition precedent to the immunity of their owner. Accordingly in *Dovaston v. Payne* ([1795], 2 H.Bl. 527) a plea of bar in avowry for taking cattle damage feasant that the cattle escaped from a public highway into the field through defect of fences, was held bad as the plea ought to show that the cattle were passing on the highway when they escaped. And Eyre C.J. said: "A party who would take advantage of fences being out of repair as an excuse for his cattle escaping from a way into the land of another, must show that he was lawfully using the easement when the cattle so escaped." The principle seems general with regard to the straying of cattle. The defendant seeking the protection of the Court on the ground of the default of the plaintiff, must not be in fault himself. Thus Heath J. in the same case says: "The law is that if cattle of one man escape into the land of another, it

is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way, for the property is in the owner of the soil, subject to an easement for the benefit of the public." And in an anonymous case reported in 3 Wils. 126, Wilmot J. observed: "If a man turn his cattle into Black-acre where he has no right, and they escape and stray into my field for want of fences, he cannot excuse himself or justify for his cattle trespassing in my field."

Whether a person's domestic animals are lawfully on a highway is a question which is more difficult to answer now than it used to be. Recent cases have cast doubts upon the law of the early cases as will be seen from matters which will be considered later.

2. There is no duty at common law on the part of an occupier of land adjoining a highway to fence his land so as to prevent his animals from straying on the highway. Such an occupier is therefore not liable for negligence if an animal of his, not known to him to be dangerous, strays on the highway and there causes damage. But where such animals are allowed to stray on a highway in such numbers or in such a manner as to cause an obstruction and to make the highway unsafe and dangerous to the persons using it, their owner may be held liable.

In considering the case of animals straying from private property upon a highway, the all-important question arises, Is there any general duty to fence lands adjoining a highway? To this there is a clear answer in the negative. Apart from the case of nuisance¹, there is no such duty. (*Potter v. Parry* [1859], 7 W.R. 182.) This being so, the omission to fence whereby domestic animals escape upon a highway and there cause damage cannot be considered negligence or a breach of duty. At any rate, arguing from general principles one would expect the result of the decisions to be as follows: If the harm suffered consist in damage to the soil or material of the highway, then the owner of the highway would have his remedy in trespass. If the harm suffered be injury to a person or damage to property lawfully upon the highway, the complainant would have his remedy in an action for negligence, provided (1) that a legal duty of the defendant towards the plaintiff and a breach of that duty be shown, and (2) that the injury or damage complained of be not too remote, i.e. that the breach of duty was the "proximate cause" of the harm occurring.

The familiar case of *Cox v. Burbidge* ([1863], 13 C.B. (N.S.) 430) is a good illustration of the principles before stated. This was an action for negligence, not for trespass. The defendant's horse, being on a highway, kicked the plaintiff, a child, who was playing there. No evidence was adduced to show how the horse came to be there, or what induced it to kick the child, or that

¹ E.g. where there is an excavation on the land which is sufficiently near the highway to be dangerous if left unfenced. (*Barnes v. Ward* [1850], 9 C.B. 392.)

it had a habit of kicking. The question of liability was argued in great detail before the Court of Common Pleas. A rule nisi to enter a nonsuit was there made absolute upon the ground that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. The question of trespass was dealt with by Erle C.J. as follows: "As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing: and if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff.

The simple fact found is, that the horse was on the highway. He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some inclosed place without the owner's knowledge. To entitle the plaintiff to recover there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff." And he went on to hold that even if there was any negligence on the part of the owner of the horse it was not connected in any way with the damage of which the plaintiff complained.

It is material to consider carefully the remarks of the learned judge or the true grounds of the decision may escape notice. The rule for a nonsuit was made absolute upon the ground (1) that there was no evidence to support an allegation of negligence—not, that even if negligence were shown no cause of action would arise; and (2) that supposing negligence were established, then it was not at all connected with the damage of which the plaintiff complained, i.e. that the damage was too remote. The mere fact of an animal being found unattended in the highway cannot be regarded as making the owner liable for the consequences. In an American case the conditions were thus laid down generally: "In order to constitute the being there of such animals wrongful on the part of the owner, it should appear that the circumstances and occasion or that the character and habits of the animal were such as to show carelessness on the part of such owner in reference to the convenience and safety of travellers on such highway." (*Holden v. Shattuck*, 34 Verm. 336.)

In English law if there is negligence then the sole question is, Was the harm too remote? With the scienter, as such, the law of negligence has nothing to do. Where the act of the animal which causes harm is not a vicious act but one within the ordinary nature of the animal to commit, the owner may still be liable, not indeed on the grounds laid down in *May v. Burdett*, but on the ground of negligence and proximity of damage.

Cox v. Burbidge was an action for negligence, and it is in this form that the remedy is sought in the majority of cases of animals straying upon a highway and doing damage there. But where the injury proceeds from a vicious act on the part of the animal whose character for harm is known, there is a breach of the absolute duty and the action might simply follow the lines of cases like *May v. Burdett* or *Jackson v. Smithson*, and allege the keeping of the animal, the scienter and the injury. Willes J. in his judgment in *Cox v. Burbidge* appears to adopt this position as the basis of the action and the ground upon which it was proper to decide it.

Here is reached the point where scienter and proximity of damage march together. With regard to injuries to human beings the matter is settled. Whether the action is for negligence or for a breach of the absolute duty, success will depend on whether there is proof of knowledge in the owner of the animal of a disposition to cause the kind of harm suffered. In the case of negligence, this proof is to establish proximity of damage; in the case of the absolute duty, this proof is to establish the scienter.

With regard to injuries to other animals or damage to property, the two matters show a considerable divergence. It is natural for one horse to kick another, at any rate, under some circumstances. (*Lee v. Riley*, ante, p. 38.) But no liability rests on the owner of the horse on this account, as the so-called rule in *May v. Burdett* deals only with acts which are not within the ordinary nature of a domestic animal to commit (see p. 71). But, introduce the element of negligence; suppose that in breach of a legal duty the owner allows his horse to be on the highway unattended, then if it kicks another animal or causes damage to property it is submitted that the owner is liable and that proof of scienter is unnecessary. The act being a natural one to the horse, the damage is not too remote (*Lee v. Riley*; *Ellis v. Loftus Iron Co.*), and all the elements of legal responsibility are present.

Some such principles as the above seem to underlie the more recent cases, which it is now proposed to examine.

In the case of *Hadwell v. Righton* ([1907], 76 L.J. (K.B.) 891) some fowls belonging to defendant, whose premises adjoined the highway, whilst straying on the highway were frightened by a dog belonging to another person. One of the fowls flew across the road and struck the spokes of a bicycle with the result that the cyclist was upset and the bicycle damaged. The County Court Judge gave judgment for defendant on the ground that an accident of such a nature was not a natural or likely consequence of allowing fowls to be on the road. A Divisional Court dismissed an appeal from the decision. Phillimore J. there adopted the view of

Erle C.J. in *Cox v. Burbidge*, that there was no sufficient proof of negligence in the defendant in respect of a duty owing to the plaintiff and that, further, the negligence, if any, of allowing the fowl to be on the highway was in no way connected with the damage done: *Causa proxima non remota spectatur*. Bray J. pointed out the true distinction between cases of animals straying on private property, and cases of animals straying on a highway: "I do not think we could decide this case in the plaintiff's favour without practically overruling *Cox v. Burbidge*. We have not the power to do that; and if we had, I certainly should not say that case was otherwise than perfectly good law. It was sought to distinguish that case by saying that the fowls in this case were trespassing on the highway, and the cases of *Lee v. Riley* and *Ellis v. Loftus Iron Co.* were cited. But an action for trespass can only be brought by the owner of the soil upon which the horses trespassed, and the decisions were based on that ground. Therefore those cases do not apply in the present case, because this cyclist had no interest in the highway, and could not have sued the owner of the fowl as a trespasser. The only ground upon which this case can be put, if at all, is that of negligence, and upon such grounds as were stated in the judgments in *Harris v. Mobbs* ([1878], 3 Exch. Div. 273)...." In that case a van had been left on the side of the road and this frightened a horse and caused it to shy and kick its driver to death. Judgment was given for the plaintiff in an action for negligence, upon the ground that there was an unreasonable and dangerous occupation of a part of the highway amounting to an

obstruction and a prevention of its free user by the public to an extent which was unreasonable.

In applying the test of *Harris v. Mobbs*, Bray J. said: "It seems to me that the element of danger is absolutely necessary in order to prove the existence of negligence. It is negligent, if at all, because the practice might be dangerous to somebody passing along the highway. I altogether decline to hold as a matter of law, or without evidence, as a matter of fact, that the presence of fowls on the highway constitutes a danger."

It is noticeable that in the principal case nothing was said as to scienter. Probably it is within the ordinary nature of a fowl to get in the way of passengers upon the highway, but apparently the Court did not think so. The question was solved by the application of the test of remoteness of damage¹.

¹ The case is further of importance in that both judges gave utterance to opinions which seem to have taken lawyers somewhat by surprise, with regard to the improper user of a highway resulting in damage to particular individuals. It was generally understood to be the law that the lawful use of a highway was limited to a right of passing and repassing. Any other user amounted to an unreasonable user and might be the ground of an action of trespass by the owner of the soil of the highway. This followed from the judgments delivered in the often-cited case of *Dovaston v. Payne* ([1795] 2 H.Bl. 527). There Buller J. made the following cryptic remark: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." And again, Heath J. said: "If it be a way, he must show he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public."

The decision in the case of *Dovaston v. Payne* was cited with approval by the Court in the case of *Harrison v. Duke of Rutland* ([1893] 1 Q.B. 142).

In *Hickman v. Maisey* ([1900] 1 Q.B. 752) the Court allowed that the public enjoyment of highways is not limited to a mere right of

In the case of *Higgins v. Searle*, decided by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) and reported in [1909], 25 T.L.R. 301, the view of the law taken by Bray J. in the last cited case was approved and adopted.

The defendant's sow, which had strayed on a highway, jumped up from the side of a hedge as a horse and van were about to pass a motor-car. The horse was frightened by the sow and shied in front of the car which then collided with the horse and van and afterwards ran into a stone wall and was damaged. In an action for damages by the owner of the motor-car against the defendant, the jury found that the defendant was not guilty of negligence in allowing the sow to be on the road and that the sow caused the horse

passing and repassing, but includes other ordinary and reasonable acts incidental to the passing and repassing. But no previous case seems to have gone the length of *Hadwell v. Righton*. There are dicta of the judges in that case which seem to point to the opinion that the fowls though straying on, or even flying across, the highway, were lawfully there. It is true that no actual pronouncement was made to that effect but that was evidently the opinion entertained. Thus Phillimore J. said: "I think further that counsel has placed too narrow a construction upon the uses that may be made of a highway. I doubt whether the view that a highway is simply to be used *eundo*, *redeundo*, and *morando* for a short time, exhausts the uses to which it may be put. And certainly, in my opinion, though I do not think it affects this case, if fowls are kept near a highway and there is a piece of ground to which they would naturally and properly go on the other side of the highway, and they crossed the highway to go there from one part of their owner's land to another, if the land were fenced so that it was necessary for the fowls to fly across, I am not prepared to say that it would be an unlawful user of the highway on the part of the owner of the fowls to allow them to cross the highway in the natural way and at the natural height, even although in flying across at that height they might strike a person riding a bicycle or a horse."

to shy, this being the probable result of the sow being on the road; but the jury could not agree as to whether the driver of the motor-car was guilty of contributory negligence. On these findings the judge declined to enter judgment for either party and treated the trial as abortive. The defendant appealed, and contended that on these findings he was entitled to have judgment entered in his favour, and this was the opinion of the Court of Appeal. The ground of the decision was that of *Cox v. Burbidge*. "No doubt a person who allows his cattle to stray is liable in damages for any consequences that may happen from such straying. But liable to whom? To the owner of the soil for damage done, not to a third party or for damages such as were claimed in this case." The question of the disposition of the sow was not raised on the pleadings, and no evidence seemed to have been given at the trial in support of it. Negligence was expressly negatived, presumably in regard to the defendant allowing the sow to be on the road. Whether the element of danger was considered does not appear from the report of the case.

The question whether the omission to fence so as to keep one's domestic animals off the highway can be alleged as the ground of negligence in such an action, was raised directly in the case of *Jones v. Lee* ([1912], 28 T.L.R. 92). There a young horse, which defendant had placed in a field, escaped on to a highway owing to a defective hedge. The horse ran across the road, and coming into contact with a tandem bicycle, fell, and then jumping up, lashed out and damaged the bicycle and injured one of the plaintiffs. The County

Court Judge found that there was no evidence that the horse was vicious, or in the habit of trespassing or attacking bicycles or anyone on the highroad. He also found that the defendant was guilty of negligence in turning the horse into a field of which the hedges were defective, but that as the act of the horse was not one which it was in the ordinary nature of a horse to commit, the defendant was not liable. The Divisional Court dismissed an appeal from the decision. Hamilton J. rested his judgment on the ground that the injury to the plaintiffs was not the natural consequence of the defendant's negligence. Bankes J. put the matter on higher ground. "He said that in order to succeed the plaintiffs had to establish that the injury was the result of some breach of duty towards them on the part of the owner of the animal. First of all, what was the duty of the owner or occupier of land adjoining the highway with regard to keeping animals off the highway or fencing in land. By common law there was no such duty at all, and they had not been told whether any such duty had been created under the Highway Acts. Suffice it to say that by common law the owner or occupier of land had no duty to keep his animals off the highway. The plaintiffs seemed to him to fail in establishing the first point—namely, that there was any duty between the owner of this animal and themselves, and he thought that the County Court Judge was wrong in law in holding that the defendant was guilty of negligence because he turned this horse into a field with defective hedges. Be that as it might, the plaintiffs would have to show in addition that the horse was one which, to its owner's

knowledge, was of a disposition likely to cause the particular damages suffered by the plaintiffs. He thought that the judge had found even that fact against the plaintiffs. The law, he said, was undoubtedly different with regard to a stray animal which is known to its owner to be dangerous. Such an animal is kept at its owner's risk, and if it escapes, he is liable for damage caused by it without proof of any negligence."

This judgment seems to be the most correct statement of the law. It carefully brings out the difference between the requirement of scienter and that of proximate cause, a matter which seems to have been previously confused. It also marks the point at which the duty of using due care merges into the duty of insurance in respect to a dangerous animal. But it does not deal with the question when and in what circumstances an escaped animal constitutes an element of danger to the passengers on the highway, that is to say, when its presence there is dangerous apart from any question of the disposition of the animal itself. This point was incidentally referred to in the case next in chronological order.

In *Ellis v. Banyard* ([1912] 106 L.T. 51) the facts were as follows. The plaintiff was cycling at about 10.30 p.m. along a highway adjoining a field belonging to the defendant in which there was a large number of his cows. Plaintiff saw some cows coming out of a gate in the field on to the road, whereupon she slowed down to jump off, but was knocked down and injured by one of the cows. In respect of the injuries so sustained, she sued the defendant. At the trial no evidence was given to show by whom the gate in

the field had been opened. The County Court Judge held that under the circumstances the fact that the gate in the defendant's field was open and that his cows strayed on to the road, and caused the accident to the plaintiff, was evidence of negligence; that it lay upon the defendant to displace such evidence by showing that the gate had not been left open by reason of any negligence on his or his servants' part; and that as the defendant had not displaced the *prima facie* case made by the plaintiff, the latter was entitled to recover. On appeal to a Divisional Court, Horridge J. adopted the view of the judge. Phillimore J. held that the onus was upon the plaintiff to show that the gate was open owing to the negligence of the defendant or that of his servants. The Court having differed, the appeal was dismissed, leave to appeal further being given. The Court of Appeal (Vaughan Williams, Buckley and Kennedy L.JJ.) allowed the appeal and ordered judgment to be entered for the defendant. All three judges adopted the ground of the decision of Bankes J. in *Jones v. Lee* and held that there was no evidence of negligence on the part of the defendant. But Lord Justice Vaughan Williams said: "I should be very sorry indeed to say anything in this case which might encourage the notion that there is no duty on the part of farmers or cattle dealers and others to take care and prevent cattle which are under their charge or control from going on to the highway in such a way as to obstruct the user of it and make it unsafe and dangerous to those using it. . . . I think that if an owner of cattle by his acts makes the highway dangerous, then that case (*Harris v. Mobbs*) is an authority in

point here that he may be sued. At the same time, I am far from saying that it is impossible that a man should be sued for putting his cattle in such a place or position that the natural result is that they go out of that place or position and if in large numbers obstruct the highway and cause damage to those who use it."

Similarly Lord Justice Kennedy said: "I should also be slow to infer that because a harmless cow or sheep is allowed to get into the highway without giving rise to a cause of action that rule applies to crowds of cattle whose mass might constitute an obstruction to travellers along the highway. There may be a case of duty arising in the case of a mass or number, even of the most harmless animals which would not apply where it was only the case of a single animal."

It is not clear what is the precise extent of these reservations. Animals which stray on a highway, it is submitted, inevitably cause a certain amount of obstruction so long as they are under no one's control. If this be so, at what point is the responsibility suggested by the learned Lords Justices to begin? Under what circumstances does an animal, or a number of animals, unattended by a human being, cause an obstruction to the highway so as to give ground for an action by those who in using the highway are injured by the obstruction? It must not be forgotten that the lawful user of the highway by animals received a broader interpretation in the recent case of *Hadwell v. Righton* than formerly. Apparently the view of the judges now is that no obstruction is caused by a single animal wandering on the highway unattended, whatever kind of animal it may be, so long as it is of an ordinarily

harmless disposition. Until a case occurs to explain the meaning of the obiter dicta in *Ellis v. Banyard* the result of the recent cases seems to be as follows: (1) An owner is not bound to prevent his cattle or other domestic animals from straying on the highway, but he is bound to use care and caution that they do not stray in such numbers as to make the highway positively unsafe and dangerous for those who use it. (2) If he omits to use such care and caution, and damage results, his breach of such duty must be proved to be the proximate cause of such damage. (3) If the straying animal causes injury by a positively vicious act, proof of scienter is essential.

3. (1) The person who keeps an animal upon premises in his occupation is under a duty to take reasonable care to prevent harm which he knows or ought to know is likely to occur from the animal to persons who enter upon the premises at his invitation, express or implied.

(2) With regard to persons entering upon such premises by the mere permission of the occupier, the duty of the latter is no more than to give warning of the likelihood of harm from the animal.

It is now necessary to consider the duties imposed by law upon the occupiers of premises in regard to their safe condition from the point of view of other persons entering upon them. It should be stated that it is not intended to deal here with any source of danger other

than the presence of a dangerous animal on the premises. There are, of course, many other causes which may render buildings and premises unsafe and dangerous to persons entering upon them. But it is not intended to touch upon cases involving these except in so far as such cases may be useful to explain the general principles applicable, and to supplement the cases on these points relating exclusively to animals. The subject under consideration involves distinctions in the extent of the duties and the classes of persons for whose benefit such duties are imposed.

And first, with respect to persons who enter upon his premises at the invitation, express or implied, of the occupier thereof, the law requires that the premises shall be in a reasonably safe condition, i.e. as safe as reasonable care and skill can make them. The leading authority upon this general principle is *Indermaur v. Dames* ([1866], L.R. 1 C.P. 274), which not only stated the duty in clear terms, but defined the persons to whom the duty is owed. Willes J. in delivering the judgment of the Court of Common Pleas said: "We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop. But it is obvious that this is only one of a class.... If a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might

not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go (not as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go) upon business which concerns the occupier, and upon his invitation, express or implied. With respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken (by notice, lighting, guarding or otherwise), and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." On appeal to the Exchequer Chamber this judgment was affirmed. The case also shows that there is no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be. On the other hand, it appears that the general duty goes beyond the exercise of mere personal care and caution. "Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so." (Pollock, *Law of Torts*, 6th Edn., p. 490. See also *Marney v. Scott* [1899] 1 Q.B. 986.) The

duty thus partakes to some extent of an absolute nature. The duty, however, does not extend to sources of danger which cannot be discovered by the exercise of ordinary care (*Hyman v. Nye* [1881], 6 Q.B.D. 685); that is to say, to harm which is too remote to be reasonably anticipated (*Sharp v. Powell* [1872], 7 L.R. C.P. 253), or to harm the effective cause of which was the act of a stranger (*McDowall v. Great Western Railway Co.* [1903], 2 K.B. 331).

Such being the nature of the general duty, its application to the case of danger from the presence of animals on the premises may now be considered. Reasonable care and caution must be taken to prevent harm occurring to "invitees" from the acts of animals kept upon the premises by the occupier. But such harm only is to be guarded against as the occupier knows or ought to know is likely to occur. This limitation is practically the same as the test of remoteness of damage in regard to cases of ordinary negligence. The occupier cannot be held responsible for dangers which he could not reasonably anticipate.

In *Clinton v. Lyons* (ante, p. 75) the plaintiff and her dog sustained injuries from the bite of a cat which was rearing kittens and was kept at one of the defendants' teashops to which the plaintiff and her husband had gone to obtain refreshment. In an action for damages for the injuries sustained the jury found that the plaintiff took her dog on the premises by permission of the defendants or with their acquiescence; that the cat to the knowledge of the defendants, had while rearing kittens a disposition to attack a dog in her neighbourhood, and a person holding a dog; that the

cat attacked the dog unprovoked; that the plaintiff's injuries were the result of the cat attacking the dog; and that the defendants did not in the circumstances take reasonable precautions for the safety of their customers. On these findings the judge gave judgment for the plaintiff. On appeal the Divisional Court entered judgment for the defendants on the grounds that there was no evidence to support the finding that a cat rearing kittens has a disposition to attack a person holding a dog or that the defendants in the case knew the danger. It was also held by Ridley J. that the risk of the injury sustained was too remote to have been reasonably anticipated; and by Bray J. that as the plaintiff was not invited to enter with her dog but that she came in by the permission or with the acquiescence only of the defendants, and that as there was no proof that the defendants knew of the dangerous character of the cat, they were not liable. After distinguishing the case of a person 'invited' and of a person 'permitted' to enter and after considering the position of the latter, Bray J. continued: "No doubt if there were an invitation the duty would be larger (i.e. than the duty in the case of a person permitted to enter). It would be a duty to take reasonable care to prevent a danger which he might reasonably have anticipated. . . . If the defendants knew or ought to have known that the cat had a disposition to attack a person *holding a dog*, they ought to have anticipated the danger and taken care to avoid it. If I thought that there was evidence of an invitation to the plaintiff to come in *with a dog* I might have to consider whether the case should go down for a new trial in order that

it might be put to the jury whether the defendants could reasonably have anticipated the danger." ([1912], 81 L.J. (K.B.) at p. 930.)

The liability of the occupier under the general rule is excluded by the contributory negligence of the person injured. But a more doubtful question is whether liability is excluded where the plaintiff knows of the risk of harm before he enters the premises. This resolves itself into the question whether the duty of the occupier is to make the premises safe or merely to give warning that they are unsafe. In this form the question is answered without difficulty. Mere knowledge on the part of the sufferer is no defence. It must also be shown that he, appreciating the risk of harm, voluntarily undertook to run the risk of it. (*Smith v. Baker* [1891] A.C. 325; *Thomas v. Quartermaine* [1887], 18 Q.B.D. 685.) Whether he did so or not is a question of fact for the jury to determine.

Turning to the case of 'permission' as distinguished from 'invitation,' what is the duty of the occupier towards a person who is permitted to enter premises where the occupier keeps an animal which is likely to cause harm? The answer is that he is bound merely to warn such person of the danger. The occupier is not under any obligation to render the premises reasonably safe to persons entering by permission, or with his 'leave and licence,' as it is called. He is not bound even to ascertain whether the premises in fact are safe. His responsibility is to give warning of dangers known to him but unknown to others.

The position of licensees was considered in *Gautret v. Egerton* ([1867], L.R. 2 C.P. 371), where Willes J.

laid down a general principle which has since caused the case to be regarded as the leading authority. "A permission to use a way is of the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee. There must be something like fraud on the part of the giver, before he can be made answerable.... Otherwise a man who allows strangers to roam over his property would be answerable for any danger which they might encounter whilst using the licence" (at p. 375). See also *Hounsell v. Smythe* ([1860], 7 C.B. (N.S.) 731).

During the user of the licence, however, the occupier is liable where he causes a new source of danger and omits to give any warning of it. (*Corby v. Hill* [1858], 4 C.B. (N.S.) 556.) He would also be liable for harm caused to the licensee by any act or omission which would be negligent on the part of one person to another having an equal right to be on the premises, e.g. where he negligently drives over a person who has permission to use a private road. (Cf. *Cockburn C.J.* in *Gallagher v. Humphrey* [1862], 6 L.T. at p. 685.)

A licensee may be defined as a person who enters on premises by the gratuitous permission of the occupier on a matter in which the occupier has no interest. In *Southcote v. Stanley* ([1856], 1 H. & N. 274) a guest was held to be a mere licensee and one to whom no 'invitation' had been given.

The principal case in which the rule was considered with reference to dangers from animals is *Lowery v. Walker* ([1911] A.C. 10), which went from the County

Court to the House of Lords. The decision in the end turned upon the facts of the case, and it is questionable whether the judgments delivered form any valuable addition to the law. Further, the case was complicated by the form of and the subsequent additions to the findings of the County Court Judge. Plaintiff had got over a fence into defendant's grass field in order to take a short cut to a gate on the opposite side and whilst crossing this field he was attacked and injured by defendant's horse. The judge found that the short cut had been habitually used by members of the public, though without leave from defendant; that plaintiff was a trespasser; that defendant knew the horse was dangerous and that the field was habitually used by the public, and that defendant was guilty of negligence in putting the horse into the field; and he gave judgment for the plaintiff. The judge subsequently made the following addition to his notes: "On the question of trespass I came to no definite conclusion. The defendant only occupied for fifteen years. I had evidence of the use of the path for thirty or forty years. The defendant objected and put up a notice fifteen years ago, but would not prosecute." For what offence he could prosecute is not clear. It could not be for trespass.

The Divisional Court held that plaintiff was a trespasser and had brought the injury upon himself, and that therefore the action did not lie. *Darling J.* adopted the test given by Chief Justice Gibbs in *Deane v. Clayton* ([1817], 7 Taunt. 533), which was approved by the Court of Exchequer in *Jordin v. Crump* ([1841], 8 M. & W. 782): "We must ask in each

case whether the man or animal which suffered had or had not a right to be where he was when he received the hurt. If he had not, then, unless indeed the element of intention to injure, as in *Bird v. Holbrook* ([1828], 4 Bing. 628), or of nuisance, as in *Barnes v. Ward* ([1850], 9 C.B. 392), is present, no action is maintainable."

The decision of the Divisional Court was affirmed by a majority of the Court of Appeal. There Vaughan Williams L.J. held that substantially plaintiff was a trespasser and could not recover for harm suffered from any source of danger there might be in the field when used in the way in which such a field was ordinarily used, e.g. a bad-tempered horse or bull, but not a tiger. Buckley L.J., in a dissenting judgment, came to the conclusion that plaintiff was in the field without leave. He was in the position of "persons who go there without any right, but who, to the knowledge of the owner, habitually go there," and he held that "a person who habitually allows his land to be used without objection by persons who in law no doubt are trespassers owes them a duty not to place on the land which he so allows them to cross an animal which he knows to be vicious and dangerous, without warning them of the danger to which they are exposed." Though the wording of the judgment as reported is obscure, it seems that the learned Lord Justice in effect held the plaintiff to be in the position of a licensee through tacit permission.

Lord Justice Kennedy, while holding that the defendant had tacitly acquiesced in the plaintiff's crossing the field, distinguished the case from that of leave and licence (as exemplified in *Gautret v. Egerton*)

on the ground that there had been nothing in the nature of encouragement, inducement or invitation.

The House of Lords reversed the decision of the Court of Appeal and held upon the findings of the County Court Judge that the plaintiff was in the field by the permission of the defendant and that in those circumstances "it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal."

4. A person who lets out for hire an animal which he knows or ought to know is dangerous, is under a duty to warn, not only the person who hires it, but also any person who he knows or contemplates or ought to contemplate will use it, and such duty is independent of contract.

Liability for harm resulting from the authorised use of dangerous animals is a case rather difficult to classify. It seems best to treat it in conjunction with the liability of the occupier of premises which are rendered dangerous by the presence of harmful animals, for both cases involve the violation of a duty of using a certain degree of care or diligence, and both should therefore be dealt with in relation to negligence.

Where a dangerous thing is delivered by the defendant to the plaintiff in pursuance of a contract, the liability of the defendant for harm suffered by

the plaintiff depends upon the terms of the contract between the parties. With cases of this kind and their application to the case of dangerous animals, this work has no concern. The defendant, however, may well be liable for harm suffered by a person who has no contractual rights in regard to the matter. Thus he may be responsible to a person for whose use the animal is intended, or to a person who the defendant knows is likely or ought to know is likely to use it. In either case his duty is the same. (*Gautret v. Egerton* [1867], L.R. 2 C.P. at p. 375; *Farrant v. Barnes* [1862], 11 C.B. (N.S.) 553.)

The general principle was stated by Lord Justice Cotton in the case of *Heaven v. Pender* ([1883], 11 Q.B.D. at p. 517) as follows: "Anyone who...without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act."

He is not responsible to other persons generally, but to those who he knows or contemplates or ought to contemplate will use it. Moreover, it is not necessary that he should actually know of the danger if he had the means of knowledge and neglected to acquaint himself with it. These two points were well brought out in *White v. Steadman* ([1913] 82 L.J. (K.B.) 846). In this case plaintiff's husband hired a horse and landau from defendant to take a party for a drive. During the drive the horse shied at a traction engine, the landau was upset, and the plaintiff, who was one

of the party, received injury. In an action for damages the jury found that the defendant knew, or ought to have known if he had used proper care, that the horse was not safe at the time he let out the landau on hire. The Court held defendant liable as he omitted to give warning of the danger. Lush J. said: "A horse of known vicious propensity is, as Mr Justice Willes said in *Cox v. Burbidge*, within the class of 'dangerous animals,' and the duty of a person who lets it out is the same as that which any person is under who allows others to use or come in contact with an animal or chattel that is dangerous in itself. He is under a duty to warn not only the person who hires it, but any person who he knows or contemplates or ought to contemplate will use it. The duty is not dependent on and is not created by the contract. It exists independently of contract. That which creates it is not the contract but the supplying of a dangerous animal or chattel for the use of another person.... But it is said that the defendant, who through his own carelessness, did not use the means of knowledge at his disposal, is in a better position than he would have been had he used them and made himself acquainted with the true facts. In my opinion this view is not correct. I think that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous, because he does not take ordinary care to avail himself of his opportunity of knowledge, is in precisely the same position as the person who knows" (at pp. 849-850).

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